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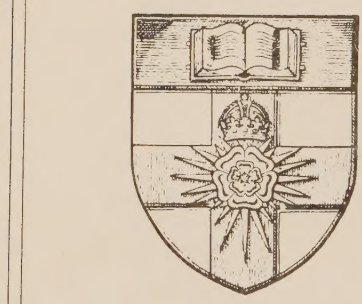

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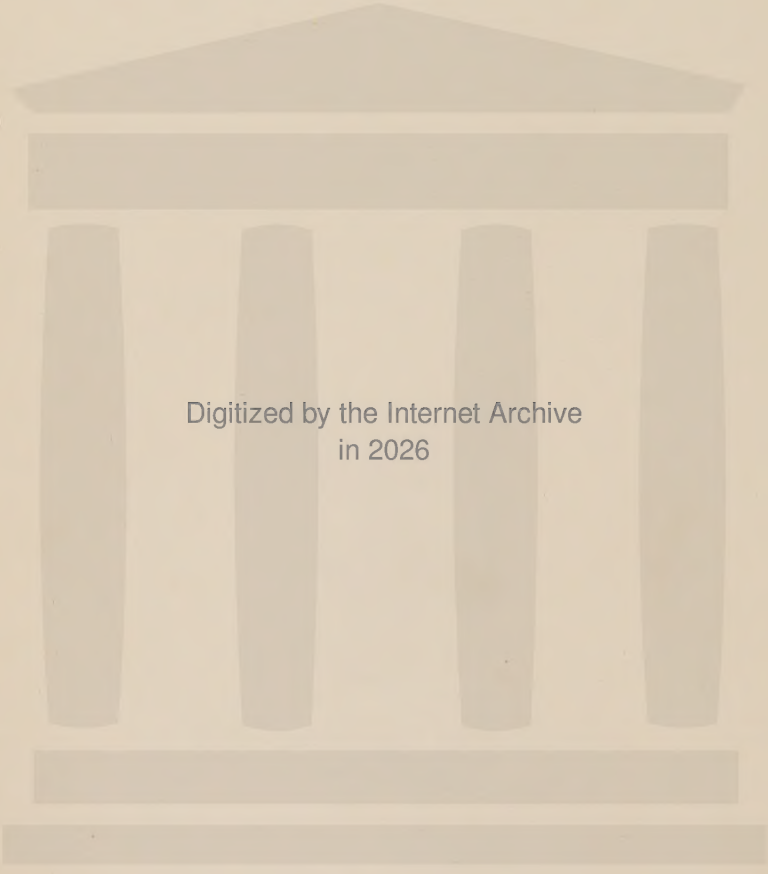

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THE

LAW REPORTS.

Chancery Appeal Cases,

INCLUDING

Bankruptcy and Lunacy Cases,

BEFORE

THE LORD CHANCELLOR,

AND THE

COURT OF APPEAL IN CHANCERY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. I.

1865-6.—XXIX & XXX VICTORIÆ.

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1866.

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ERRATA & ADDENDA.

[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page	Line	For	Read
33	— 4	three	two
37	7	In Milton	In the note on Lycon
37	foot-note (17)	746	176.
169	— 10	80	81.
170	head-note	136	116.
284	foot-note (6)	Add Ref. Law Rep. 1 Q. B. 78.	
285	foot-note (2)	Add Ref. Law Rep. 1 Q. B. 186.	
384	— 7	Vice	Will. 4
557	foot-note (7)	Law Rep. 339	Law Rep. 1 C.P. 359.

ERRATA & ADDENDA.

[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page	*Line*	*For*	*Read*
23	— 4	three	two.
27	7	In *Ellison*	In the note on *Ellison*.
27	foot-note (17)	746	176.
169	— 10	to	of.
170	head-note	136	110.
284	foot-note (6)	Add Ref. Law Rep. 1 Q. B. 72.	
285	foot-note (2)	Add Ref. Law Rep. 1 Q. B. 156.	
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ORDER IN LUNACY.

1866

10th February, 1866.

WHEREAS since the General Orders in Lunacy, bearing date the 12th day of January, 1855, were made, it has become the duty of the legal as well as of the medical visitors of lunatics to visit lunatics, and to make inquiries as to their care and treatment and the arrangements for their maintenance and comfort, and otherwise respecting them.

NOW I, ROBERT MONSEY BARON CRANWORTH, Lord High Chancellor of Great Britain, intrusted by virtue of Her Majesty the Queen's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do with the advice and assistance of the RIGHT HONOURABLE SIR JAMES LEWIS KNIGHT BRUCE and the RIGHT HONOURABLE SIR GEORGE JAMES TURNER, the Lords Justices of the Court of Appeal in Chancery, also being intrusted as aforesaid, and by virtue and in exercise of the powers or authorities in this behalf vested in me by "The Lunacy Regulation Act, 1853," and of every other power or authority in anywise enabling me as Lord Chancellor, or as being intrusted as aforesaid, Order as follows:—

I.

That the legal as well as the medical visitors of lunatics shall make the inquiries and perform the duties directed by the said General Orders, and that the reports of the legal visitor shall be treated and acted upon in the same manner as is directed by the said General Orders with respect to the reports of the medical visitors.

II.

The said General Orders shall in all respects apply and extend to the legal in the same manner as to the medical visitors of lunatics.

CRANWORTH, C.
J. L. KNIGHT BRUCE, L. J.
G. J. TURNER, L. J.

1866

ORDER OF COURT.

7th May, 1866.

The Right Honourable Robert Monsey Lord Cranworth, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, and The Honourable the Vice-Chancellor Sir Richard Torin Kindersley, doth hereby, in pursuance and execution of all powers enabling him in that behalf, Order and Direct in manner following:—

1. The Rule numbered 29 of the 23rd of the Consolidated General Orders is hereby abrogated.

2. As soon as the Docket of a Decree or Order is signed by the Lord Chancellor for the purpose of Enrolment, the Clerks of Records and Writs shall forthwith cause the same to be engrossed in the proper form, and transmit the same to the Public Record Office, Chancery Lane.

Cranworth, C.
Romilly, M.R.
Richd. T. Kindersley, V.C.

ORDER OF COURT.

1866

22nd May, 1866.

WHEREAS, by an Act passed in the Session of Parliament holden in the 23rd and 24th years of the reign of Her Majesty Queen Victoria, chapter 149: It was in the 9th Section enacted, that the deeds, books, documents, and papers belonging to the Suitors in the said Court, which had been theretofore under the custody of the Masters in Ordinary of the said Court, should be transferred to the custody of the Clerks of Records and Writs of the said Court, and WILLIAM WORDEN, the Office Keeper at the Offices in Southampton Buildings, Chancery Lane, where such deeds, books, documents, and papers were deposited, should have the care of the same, and should so far as related thereto be considered the Officer of the Clerks of Records and Writs, and should hold such Office at the pleasure of the Master of the Rolls, and that on the death, retirement, or removal of the said WILLIAM WORDEN it should be lawful for the Master of the Rolls to appoint a person to have the care of such deeds, books, documents, and papers, at a yearly salary not exceeding One hundred pounds, and on any vacancy in such office to supply such vacancy.

AND WHEREAS by "The Courts of Justice Building Act, 1865," after reciting that the legal business hitherto carried on in the buildings situate in or near Southampton Buildings known as the "Masters' Offices," and erected in pursuance of the Act of the Session of the 32nd year of King George the Third, chapter 42 was intended to be transacted in the courts, offices, and premises authorized to be erected under that Act, and it was expedient that such Masters' Offices should be appropriated in manner thereinafter mentioned for public purposes, it was enacted that all the buildings erected as aforesaid, with the sites thereof, and all the lands and hereditaments, if any, purchased or acquired in pursuance of the said Act of the 32nd year of King George the Third, with all their

1866

actual and reputed appurtenances, should on the passing of that Act vest in the Commissioners of Her Majesty's works and public buildings as incorporated by the Act of the Session of the 15th and 16th years of the reign of Her present Majesty; chapter 28, to be held by them for the purposes of the last-mentioned Act, discharged from all subsisting trusts declared with respect thereto, provided that the said Commissioners should not take possession of any part or parts of the said buildings that might be occupied for legal purposes until the Lord Chancellor certified that in his opinion such part or parts was or were no longer required by the person so occupying the same.

And whereas that portion of the said buildings in which the said deeds, books, documents, and papers are now deposited is not well adapted for the purpose, and the greater part of such buildings has been appropriated for the use of the Patent Office, and it is desirable that the said deeds, books, documents, and papers should be deposited and kept in the Public Record Office, where divers records and documents belonging to the said Court are deposited.

Now I do hereby order that the said deeds, books, documents, and papers, which are now deposited in the said buildings in Chancery Lane aforesaid, shall be removed therefrom, and shall be deposited and kept in the Public Record Office, and shall there remain and be under the same custody and care as is provided with respect to such deeds, books, documents, and papers by the said 9th Section of the first hereinbefore recited Act.

Cranworth, C.

ORDER OF COURT.

1866

19th July, 1866.

The Right Honourable Frederick Lord Chelmsford, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, The Honourable Sir Richard Torin Kindersley, The Honourable Sir John Stuart, and the Honourable Sir William Page Wood, doth hereby, in pursuance and execution of the powers given by the Statute 25 & 26 Vict. c. 89, and of all other powers and authorities enabling him in that behalf, Order and Direct in manner following:

At all times when the Chambers of the Judge to whose Court the matter of the Winding-up of any Company is attached shall be closed for any Vacation:

The Chief Clerk of the Master of the Rolls, or of any one of the Vice-Chancellors of the Court, may, notwithstanding the matter of such winding-up may not be attached to the Court of such Judge, countersign any cheque or order, request or direction, which under the 42nd and 43rd rules of the General Order, dated 11th of November, 1862, is required to be countersigned by the Chief Clerk of the Judge.

Chelmsford, C.
Romilly, M.R.
Richard T. Kindersley, V.C.
John Stuart, V.C.
W. P. Wood, V.C.

1866

ORDER OF COURT.

22nd November, 1866.

The Right Honourable Frederick Baron Chelmsford, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, The Right Honourable the Vice-Chancellor Sir Richard Torin Kindersley, and The Honourable the Vice-Chancellor Sir John Stuart, doth hereby, in pursuance of the Statute 15th and 16th Victoria, chapter 86, and in pursuance and execution of all other powers enabling him in that behalf, Order and Direct in manner following:

1. Article 1 of Rule 10 of Order 33 of the Consolidated General Orders, and Rules 12 and 13 of the same Order, shall be respectively varied, and as varied shall be respectively read as follows:

Article 1 of Rule 10 of Order 33 and Rule 12 of the same Order, shall be respectively read as if the words "or set down a motion for a Decree or Decretal Order" were expunged therefrom respectively, and in lieu of those words, the words "or serve a notice of motion for a Decree or Decretal Order" were inserted therein respectively:

And Rule 13 of the same Order shall be read as if the words "unless a motion for a Decree or Decretal Order shall have been set down in the meantime" were expunged therefrom, and in lieu of those words, the words "unless a notice of motion for a Decree or Decretal Order shall have been served in the meantime" were inserted therein.

2. The Plaintiff, who has served a notice of motion for a Decree or Decretal Order, shall set down such motion within one week after the expiration of the time allowed to him by Rule 7 of Order 33, to file his Affidavits in reply, in case the Defendant

shall have filed any Affidavit—or within one week after the expiration of the time allowed to the Defendant, by Rule 6 of Order 33, to file his Affidavits in answer, in case the Defendant shall not have filed any Affidavit. But in case the time allowed for either of the purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time. 1866

3. If the Plaintiff shall fail to set down the motion within the time above limited, the Defendant may either move to dismiss the Bill with costs, for want of prosecution, or set the motion down at his own request.

4. The Clerk of Records and Writs shall not give a Certificate that a motion for a Decree or Decretal Order is in a fit state to be set down until after the expiration of the time allowed to the Plaintiff, by Rule 7 of Order 33, to file his Affidavits in reply, in case the Defendant shall have filed any Affidavits, or until after the expiration of the time allowed to the Defendant by Rule 6 of Order 33 to file his Affidavits in answer, in case the Defendant shall not have filed any Affidavit. But in case the time allowed for either of the purposes aforesaid shall be enlarged, then not until after the expiration of such enlarged time.

5. In all cases in which the time allowed by Rules 6 and 7 of Order 33, for filing Affidavits in answer or in reply, shall be enlarged, notice thereof shall be given to the Clerk of Records and Writs by production of the order for such enlargement.

CHELMSFORD, C.
ROMILLY, M.R.
RICHARD T. KINDERSLEY, V.C.
JOHN STUART, V.C.

This is a repetition of G.O. 6 Dec 1856 (14 Jur 322; 2 Jur N.S. 1) which was held invalid because only signed by 2 Judges in addition to the LC see Short v Robbins 1 ZRCL 4 pp 13-17 Jan 1899

1866 ORDER OF COURT.

6th December, 1866.

I, The Right Honourable Frederick Baron Chelmsford, Lord High Chancellor of Great Britain, do hereby, in pursuance and execution of the powers given by the Statute 28 & 29 Victoria, chapter 99, order that any suit or matter transferred from any County Court to the Court of Chancery, under the provisions of section 9 of the said statute, shall proceed in the Court of the Honourable the Vice-Chancellor Sir John Stuart.

Chelmsford, C.

COUNTY COURTS.

Equitable Jurisdiction.

The following order of Court has just been issued by the Lord Chancellor :—

> "I, the Right Honourable Robert Monsey Baron Cranworth, Lord High Chancellor of Great Britain, do hereby, in pursuance and execution of the powers given by the statute 28th and 29th of Victoria, cap. 99, order that any suit or matter transferred from any County Court to the Court of Chancery, under the provisions of section 9 of the said statute, shall proceed in the Court of the Honourable the Vice-Chancellor Sir Richard Torin Kindersley.
>
> "Dated this 23rd day of December, 1865.
>
> "CRANWORTH, C."

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR,

AND THE

COURT OF APPEAL IN CHANCERY.

WALLACE *v.* THE ATTORNEY-GENERAL.
JEVES *v.* SHADWELL.

L. C.
1865
Nov. 3.
Dec. 4.

Succession Duty (16 & 17 *Vict. cap.* 51)—*Will—Legacy—Foreign domicil.*

Succession Duty is not payable on legacies given by the will of a person domiciled in a foreign country.

TWO Petitions were presented in the above-mentioned suits which involved the same question, and were, therefore, heard together. The Petition in the first suit was originally set down before the Master of the Rolls, and the other before Vice-Chancellor *Wood;* but in consequence of the state of the authorities they were heard before the Lord Chancellor in the first instance.

WALLACE *v.* THE ATTORNEY-GENERAL.

The facts in this case were as follows:—

Lord *Henry Seymour,* a younger son of the late Marquis of *Hertford,* was born in *France* in 1805. He always resided in *France,* and his domicil was French. He left at his death twenty-one wills, or testamentary papers, all of which were duly registered according to the laws of *France;* but three of them were invalid for want of compliance with the forms necessary by

L. C. 1865 WALLACE v. THE ATTORNEY-GENERAL. JEVES v. SHADWELL.

French law. He was possessed of large property, real and personal, both in *France* and in *England;* the personal property in *England*, consisting of a leasehold house, and of a sum of £72,483 1*s.* 8*d.* Consols, standing in his own name in the English funds. He gave by his several testamentary papers a great number of legacies, and bequeathed all the residue of his personal estate to the "Hospices" of *Paris* and *London* (1). By one of the testamentary papers, he appointed the Plaintiff and Mr. *Edgar Disney* to be his executors in *England.*

The testator died in *France* on the 16th of August, 1859 Mr. *Disney* having declined to act in the trusts of the will, probate of the eighteen valid testamentary papers was obtained by the Plaintiff alone.

A part of the Consols sufficient to raise a sum of £24,000 was sold by the executor under the sanction of the Court, and remitted to *France* for the purposes of the will, leaving the sum of £46,475 19*s.* 5*d.* Consols still standing in the name of the executor.

The Commissioners of Inland Revenue claimed to be entitled to succession duty on all the testator's personal estate which was situate in *England* at the time of his death. The Plaintiff accordingly filed the present Petition praying the opinion of the Court whether the sum of Consols was liable to the duty. It was admitted that the leasehold house was not exempt.

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IN this case the facts were as follows:—

John Inkson being domiciled in *Port Natal*, and residing at *D'Urban* in that colony, made his will, dated the 4th of March, 1851, and thereby gave all his real and personal property to *Ann Brownfield*, and appointed her his sole executrix. He died on the 9th of April, 1853.

Ann Brownfield, who was also domiciled in *Port Natal*, made her will on the 9th of May, 1853, and bequeathed all money or property bequeathed to her by *John Inkson* to the Plaintiffs, *Susan Jeves* and *Sally Smith*, and appointed *William Patrick Jackson* her executor. *Ann Brownfield* died on the 1st of June, 1853.

The *Succession Duty Act* (16 & 17 Vict. c. 51) came into

(1) See 33 Beav. 384, 10 Jur. N.S. 249

operation after the death of *John Inkson*, but before that of *Ann Brownfield*. *John Inkson* was entitled to a sum of stock in the Court of Chancery in *England*, to obtain which the Plaintiffs instituted the present suit for the administration of the estates of *J. Inkson* and *Ann Brownfield*. Administration, with copies of the wills annexed, of both these estates, was granted to the Defendant, *Thomas Mitchell Shadwell*, for the benefit of *W. P. Jackson*, and it only now remained to divide the residue, consisting of a sum of £448 cash between the legatees, subject to the question of the succession duty. The present Petition was accordingly filed by the Plaintiffs, praying that the fund might be declared not to be liable to the duty.

The second section of the *Succession Duty Act* (16 & 17 Vict. c. 51) under which the duty was claimed, is as follows :—

"Every past or future distribution of property, by reason whereof any person has or shall have become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution, a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

The *Attorney-General* (Sir *R. Palmer*) and Mr. *Melville*, for the Crown :—

We admit that legacy duty is not payable on personal property bequeathed by a testator domiciled abroad; *Thomson* v. *Advocate-General* (1). But it does not follow from this that it should be

(1) 12 Cl. & F. 1.

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exempt from succession duty. The 18th section of the Act does not apply to this case: *Attorney-General* v. *Fitzjohn* (1). The object of the *Legacy Duty Act* was to include British subjects only. The words of the *Succession Duty Act* are wider, and its object was to sweep in all property real and personal, independently of domicil, which, although under the dominion of the English courts, escaped legacy duty.

In *Re Lovelace* (2) and *Re Wallop's Trusts* (3), it was decided that the foreign domicil of the donee of a general power, exercised by will, did not affect the question, and that the appointee under such a power is liable to succession duty. The same principle would apply to a legatee; and in the latter case, Lord Justice *Turner* said (4), "The Act was clearly intended to extend to cases which can in no way be affected by the rule *mobilia sequuntur personam:* and it would be very difficult to say, that if in the case of real estate devised by a person domiciled out of Great Britain, the devisee would be liable to the duty imposed by this Act (which would clearly be the case according to the terms of the Act), the legatee of the personal estate of a person so domiciled, or the appointee of the donee of a power so domiciled, was not equally intended to be liable. This opinion has been followed in *Re Captevielle* (5). *Attorney-General* v. *Blucher de Wahlstall* (6), and *Re Smithe's Will* (7). They also referred to the 1st, 2nd, 10th, 18th, 42nd, and 44th sections of the *Succession Duty Act* (16 & 17 Vict. c. 51).

Mr. *Baggallay*, Q.C., and Mr. *Schomberg*, for the Plaintiff, in *Wallace* v. *The Attorney-General;* Mr. *Southgate*, Q.C., and Mr. *Dalton*, for the French executor; Mr. *Wickens* for the Attorney-General representing the charities to which legacies had been bequeathed by Lord *H. Seymour;* Mr. *Vincent* for the Marquis of *Hertford*, the testator's next of kin; and Mr. *Westlake* for the Plaintiffs in *Jeves* v. *Shadwell*:—

The object of the *Succession Duty Act* was to bring real estate

(1) 2 H & N. 465.
(2) 4 De G & J. 340; 5 Jur. N.S. 694
(3) 1 D. J. & S. 656; 10 Jur. N.S. 328
(4) 1 D. J. & S. 671; 10 Jur. N.S. 329
(5) 2 H. & C. 985; 10 Jur. N.S. 1155
(6) 3 H. & C. 374; 10 Jur. N.S. 1159
(7) 12 W.R. 933.

under taxation, not to make personal property liable, on which legacy duty was not formerly payable. Foreigners are not affected by a statute except by express words. *Tatnall* v. *Hankey* (1). *Jefferys* v. *Boosey* (2).

There must be some limitation to the operation of the Act. We contend that the limitation depends on the construction of the word "disposition." This must be interpreted by the ordinary rules of construction of statutes, and by the law and practice of nations. The only reasonable construction is that it means an English disposition; *Westlake* on Private International Law, p. 302. The words "any person" in the *Legacy Duty Act*, are confined to persons domiciled in England, and the word "disposition" in the *Succession Duty Act* is not a wider term. The Attorney-General would only limit the Act by confining it to English property; but pure personal property is moveable, and has no locality. English personal property means only the property of a person domiciled in *England*.

The observations of Lord Justice *Turner* in *Re Wallop's Trusts* (3), were merely dicta. The point decided in the case related to the execution of a power, not to a legacy, and the "disposition" was the deed creating the power.

The *Attorney-General*, in reply:—

The property referred to in the Act is that which is the legitimate object of British legislation; that is, any property which is subject to and administered by British law. That is the only limitation of the Act. The principle on which it was decided that legacy duty was not payable under a will of a person domiciled abroad was *mobilia sequuntur personam;* but that does not apply to the succession duty, because that tax affects the property at a later period, namely, when a title has accrued to the donee.

Dec. 4. LORD CRANWORTH, L.C.:—

The question raised in the case of *Wallace* v. *Attorney-General* is one of great importance—whether succession duty is payable on legacies given by the will of a person domiciled in a foreign

(1) 2 Moo. P.C. 342. (2) 4 H. L. C. 815. (3) 1 D. J. & S. 671;

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country. The duty is claimed under the *Succession Duty Act*, 16 & 17 Vict. c. 51.

[His Lordship then read the 2nd section, and stated the facts in the case of *Wallace* v. *The Attorney-General*, as set forth above, and continued:—]

That no claim could be sustained for legacy duty was not disputed. The law on that subject was finally settled by the House of Lords in *Thomson* v. *The Advocate-General* (1). The question there arose on the will of a person domiciled in *Demerara*, disposing of personal property locally situate in *Scotland*. Probate had been taken out in *Scotland* for the purpose of realizing the assets there, and paying the legacies to the legatees. It was held that no legacy duty was payable, the testator not having been domiciled in the *United Kingdom*, the question in every case being not where the property is situate, but what was the domicil of the testator; and, therefore, in a case in the Exchequer, decided after that of *Thomson* v. *The Advocate-General*—I allude to the *Attorney-General* v. *Napier* (2)—it was held that where a testator died domiciled in this country legacy duty was payable on his personal estate, though not situate in this country. This was the converse of the case of *Thomson* v. *The Advocate-General*, and was a necessary consequence of the principles on which that decision rested.

It is clear, therefore, that no legacy duty can be claimed in this case. But it was argued that the grounds on which the decisions as to legacy duty rested, are inapplicable to claims under the *Succession Duty Act*. The legacy duty is imposed on every legacy given by any will or testamentary instrument of any person. These words, it was truly said, must of necessity receive some limitation in their application, for they could not in reason extend to all persons, whether subjects of this country or foreigners, and wheresoever domiciled; and the true limitation has been held to be a limitation confining the words which impose the duty to legacies given by the wills of persons domiciled in the *United Kingdom*, to whom alone the enactments imposing the duties could have been intended to apply.

(1) 12 Cl. & F. 1. (2) 6 Ex. 217.

These restrictions do not, it was argued, necessarily or naturally apply to the duties imposed by the *Succession Duty Act*, where no particular instrument like a will is referred to, but the liability of the person charged is created, so to say, at a later stage, *i.e.*, not with reference to the instrument under which he derives title, but from the fact that on the death of another he becomes entitled in succession, however that title may have arisen. I have given full attention to this argument, but it has failed to satisfy me; I think that there is necessarily an implied limitation as to the persons liable to duty under the latter as well as under the former Act.

By the 2nd section of the Act every disposition of property by reason whereof any person shall on the death of another *become entitled* to any property shall be deemed to confer on the person *so becoming entitled*, a succession, and on that succession the duty is imposed by section 10.

The question, therefore, is whether, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person *becoming entitled* to that property within the true intent and meaning of the 2nd section. I think not. I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country. Any wider construction would give rise to difficulties hardly to be surmounted. In collecting the duties, the officers of the revenue will in general find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. The officers know, or must be supposed to know, what these laws are with respect to the persons liable by our laws to the duties to be levied. But who the parties entitled under a foreign will are, is a question which no knowledge of our laws will enable them to solve. It can only be ascertained by evidence in every case shewing what the foreign law is and who is entitled under it. In some cases this may admit of little or no doubt, but in others it may be a matter of great difficulty, and in no case can the officers safely act until the rights of parties have been ascertained litigiously.

But even when it is ascertained who the parties entitled are, it by no means follows that the amount of duty payable would be

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11 Eq 475.

known. I will put this case. Suppose a French father dying and leaving an illegitimate child, having recognised him in the mode prescribed by the French Code, so as to give him the status of a legitimate child. To what duty is that child to be liable? It is hardly reasonable to say that he is to be ascertained by the French law as being entitled to some and in certain cases to all the rights of a legitimate child, and yet that we are to treat him for purposes of duty as a mere stranger. But the difficulties do not end here. Suppose that there are assets to the amount of £10,000 in *France*, and to the same amount in *England*, and that there are debts in *France* to the amount of £10,000, the whole of the French assets will be exhausted in payment of debts, so that the quantum of assets in this country would afford no sure criterion of the amount of duty payable, even if it were payable at all, for in such a case justice would require that the debts should be marshalled so as to attribute a fair proportion to the assets of each country. No correct conclusion could be arrived at as to the ultimate surplus on which duty would be payable till an account had been taken of the French assets and of the debts which had been paid out of them, an account at which we should have no means of arriving. But suppose, on the contrary, that there were no debts in *France*, but debts in this country exhausting the funds here; the executor here paying, as he must pay, all his assets in discharge of debts, could not possibly enforce any claim against the French assets for duty on the surplus there, which his payments in *England* had left free to the legatees.

These are all difficulties on the surface, and probably many more might be discovered by further investigation. The consideration of them has satisfied me that the only safe way of solving this question, as that relating to legacy duty, is to consider the duty as imposed only on those who claim title by virtue of our law. I must add that the silence of the Act on this point seems to me strongly to shew that the intention of the Legislature was such as I have stated. The statute was passed only about eight years after the decision of the House of Lords in *Thomson* v. *The Advocate-General*, and when the non-liability to legacy duty of legatees under the wills of persons not domiciled in this country had been fully established, after having for a long time previously given rise to

much discussion. I can hardly think that the Legislature intended, by a side wind, as it were, and without any preamble indicating its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different courts, had established the rights of persons claiming as legatees under foreign wills. No one reading the *Succession Duty Act* could suppose that though it had no effect on legatees under the wills of testators domiciled in this country, it yet would by changing the name of legacy into that of succession, totally alter the rights of persons claiming title to personal property in this country under the wills of persons domiciled abroad.

15 Eq 12,

Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country; but I can hardly think we ought to presume such an intention, unless it is clearly stated.

The ground on which my opinion rests is that to the generality of the words in the second section under which a duty is imposed upon every person who becomes entitled to property on the death of another, some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country.

I will only add that this decision does not conflict with either of the cases decided by the Lords Justices—*Re Lovelace* (1), and *Re Wallop's Trust* (2). They were both cases of testamentary appointment under English instruments, not of wills; and such an instrument must necessarily be construed by our own laws, not by that of the domicil of the person executing the power.

11 Eq 381.

The decision in *Jeves* v. *Shadwell* must be to the same effect.

(1) 4 De G. & J. 340, 5 Jur N S 694.

(2) 1 D. J. & S. 656; 10 Jur N S 328

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MORTIMER *v.* BELL.

Vendor and Purchaser—Sale—Conditions of Sale—Puffers.

Property was put up for sale by auction, the conditions stating that the highest bidder was to be the purchaser, and not saying anything as to bidding on behalf of the vendors. An agent of the vendors bid £2,500, the auctioneer then bid £2,600, and the agent and the auctioneer continued bidding against each other, till the biddings reached £3,600. The defendant then bid £3,650, and the property was knocked down to him:—

Held, reversing the decision appealed from, that the vendors could not enforce the contract.

Quære whether the rule allowing one puffer is good.

THIS was an appeal by the Defendant, a purchaser, from a decree of the Master of the Rolls for specific performance.

The Plaintiffs, who were the trustees of the will of *Hugh Hamilton Mortimer*, put up a freehold property for sale by auction on the 24th of August, 1864, under conditions of sale, the first of which was: "The highest bidder shall be the purchaser; and if any dispute shall arise as to the last or best bidding, the lot in dispute shall be put up again and resold." The sale was not stated to be without reserve, nor on the other hand was it stated that any one would bid on behalf of the vendors. The property was knocked down to the Defendant at £3650, and the abstract was delivered on the same day.

On the 1st of September, 1864, the purchaser sent in requisitions, one of which was as follows: "Are the vendors' solicitors, or auctioneers, or the vendors themselves, or any of them, aware of any bidding having been in fact made at the auction by or on behalf of the devisees, or any of the family of the late Mr. *Mortimer?* The printed conditions of sale do not authorize any such bidding."

The reply was, "The purchaser is bound by the conditions of sale. The vendors do not know of any of the biddings inquired after by the purchaser. The purchaser is bound by the conditions of sale, and cannot make new conditions for himself."

On the 24th of October, the Defendant rejoined that this reply was not full and satisfactory. The vendors answered as follows:

"The vendors rely on their former answer already given. They are not aware of any biddings having been made on their behalf by any person or persons whatsoever, and they add that there is no pretence for the suggestions made by the purchaser's objections."

The purchaser insisting that the sale was fraudulent, and refusing to complete, the vendors filed a bill for specific performance, and the purchaser brought an action to recover his deposit.

From the evidence in the cause it appeared that what took place at the sale was as follows: The vendors instructed the auctioneer to put up the property for sale, but not to let it go under £4000. The auctioneers, very eminent men in their line of business, employed a person named *Webb* to bid, which the member of the firm who acted at the sale stated in his evidence to be the universal practice unless a sale was to be without reserve. *Webb*, by the direction of the auctioneer, started the biddings at £2500. The auctioneer then bid against *Webb*, and so on, until the biddings reached £3600. The Defendant then bid £3650. The auctioneer then, by the direction of one of the vendors, who was present, ceased to bid, and the property was knocked down to the Defendant at £3650. From the first bidding of £2500, the biddings had advanced by £100 each time, *Webb* and the auctioneer bidding alternately, so that there had been eleven fictitious biddings, that of the Defendant being the only real one.

The Master of the Rolls made a decree for specific performance.

Mr. *Baggallay*, Q.C., and Mr. *Steere*, in support of the decree:—

The rule as to puffing is not the same in equity as at law, it being settled that in equity the employment of one puffer is legitimate—Sug. V. & P. (1), *Smith* v. *Clarke* (2). Courts of equity always sell subject to a reserved bidding, and thus, by their practice, recognize the principle laid down in the equity cases, that a vendor may employ a person to bid so as to prevent the property from being sold below a reserved price, which is all that was done here.

Mr. *Hobhouse*, Q.C., and Mr. *Busk*, in support of the appeal:—

The cases in equity do not support this sale. There were two

(1) 13th ed. p. 8. (2) 12 Ves. 477.

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persons bidding for the vendors, and the Defendant was misled by a sham competition into bidding what he believes to be far above the value. There is no case in the books in which specific performance has been been decreed where there was more than one puffer. It is true that the Court of Chancery always fixes a reserved bidding, but the conditions of sale give notice of the fact: Davidson's Prec. (1). At law, the present sale is clearly bad: *Bexwell* v. *Christie* (2), *Howard* v. *Castle* (3), *Thornett* v. *Haines* (4). It is so according to the law of other countries: Bell's Principles of Scotch Law (5), Kent's Commentaries (6), *Veazie* v. *Williams* (7). The remarks of Lord *Loughborough* in *Conolly* v. *Parsons* (8) are strong in our favour. A person may be driven on to bid almost anything if he believes that there is another person in the room anxious to get the property. Now as to the cases in equity. In *Bramley* v. *Alt* (9) there was a real competition after the puffing had stopped, and Lord *Alvanley's* remarks shew that he would have decided this case in our favour. In *Smith* v. *Clarke* (10), Sir *W. Grant* says that if there were several bidders for the vendors, and no real bidder except the Defendant, the sale would be bad, which is just this case. In *Woodward* v. *Miller* (11), there were five genuine biddings after the puffer had stopped. In *Flint* v. *Woodin* (12) there was notice of a reserved price. The condition that the highest bidder shall be the purchaser is equivalent to saying that the sale is without reserve: *Crowder* v. *Austin* (13), *Green* v. *Baverstock* (14); and if so, the employment of even one puffer vitiates the sale: *Meadows* v. *Tanner* (15), *Robinson* v. *Wall* (16). The vendor must not resort to proceedings calculated to entrap: *Robinson* v. *Musgrove* (17); and as Lord *Mansfield* said, in *Bexwell* v. *Christie* (18), there are only two ways in which a vendor can honestly fix a reserve price: 1. He may put up the

(1) Vol. i. p. 576.
(2) Cowp. 395.
(3) 6 T. R. 642.
(4) 15 M. & W, 367.
(5) 5th ed. p. 51, s. 131.
(6) Vol. ii. 537-8.
(7) 3 Story, 623.
(8) 3 Ves. 625.
(9) 3 Ves. 620.
(10) 12 Ves. 477.
(11) 2 Coll. 279.
(12) 9 Hare, 618.
(13) 2 Car. & P. 208; 3 Bing. 368; 11 B. Moo. 283.
(14) 14 C. B. (N. S.) 204.
(15) 5 Madd. 34.
(16) 10 Beav. 61; 2 Ph. 372.
(17) 8 Car. & P. 469.
(18) Cowp. 395.

property at the price under which it is not to go; or, 2. He may, by his conditions, reserve to himself liberty to bid. [*Blachford* v. *Preston* (1), *Wheeler* v. *Collier* (2), *Rex* v. *Marsh* (3), and Story's Eq. Jur. ss. 201, 293, were also referred to.]

Mr. *Baggallay*, in reply:—

It is well known to all the world that in a sale of real property by auction there is understood to be a reserved price unless the contrary is stated. The cases at common law are mostly old, and it is questionable whether they would now be followed; but assuming them to be against me, the equity cases establish the rule that a vendor may, without special notice, take means to prevent his property from going below a certain price. The Court of Chancery gives notice of there being a reserved price, because the old practice had been to sell without reserve: *Jervoise* v. *Clarke* (4), *Shaw* v. *Simpson* (5). What was done here was not to enhance the price, but only to prevent a sale at an under-value.

[The LORD CHANCELLOR:—Is there any other case than those relating to puffing where a Court of equity enforces a contract which Courts of law pronounce to be void on the ground of fraud?]

Nov. 17. LORD CRANWORTH, L.C., after stating the facts, continued:—

The conditions of sale in this case contained the usual provision that the highest bidder should be the purchaser.

Courts of law have held that such a condition prevents the vendor from interposing any reservation—that he has, by that condition, agreed that whoever offers the highest price shall have the property. A bidding by the vendor, or his agent, is, it said, no bidding, and so there is a contract that the highest bidder other than the vendor shall be the purchaser.

It is not disputed that the vendor may stipulate for the power of buying in the property if it is going at a sum below what he considers a fair price. But in the absence of such stipulation,

(1) 8 T. R. 89. (2) 1 Moo. & M. 125. (3) 3 Y. & J. 331.
(4) 1 Jac. & W. 389. (5) *Ibid.* 392, 277.

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courts of law hold, that it is a fraud in a vendor to interpose any bidder to prevent the property from going to the person who offers the highest price.

This is certainly the rule established in courts of law; but it is said that a different rule prevails in Courts of equity, and that without any express stipulation a vendor may always fix a reserved price, and authorize a person to bid for him, so as to prevent the property going under that price. The present case, it is argued, comes within that rule.

That such a rule to some extent may be said to exist, I cannot doubt. Its existence has been recognized by many judges of the highest reputation. Sir *William Grant*, in *Smith* v. *Clarke* (1), not only recognizes, but apparently approves of the rule. He seems to think it fair and just that persons putting up property for sale by auction should be at liberty to employ a person to bid for them up to a stipulated price to prevent its being sold at an under-value. Where such a right is stipulated for, there is no fraud, no deception. It is said that even without express stipulation such a right is understood to exist. I confess I think it much better that it should be notified. If it be not notified, there is a difference between the language expressed and that which it is said is understood to be its import. The question in such cases may always arise, whether persons bidding were aware of the rule. The practice of the Court of Chancery, in modern times at all events, is to stipulate expressly for the right not to sell under a fixed price, and so by implication to employ a person to bid up to that price. But even if such a right is (as alleged in the evidence of Mr. *Trist*) assumed to be reserved in every sale by auction, unless expressly without reserve, still that does not seem to me to warrant what was done in this case. Here there were in effect two persons (*Webb* and the auctioneer) bidding for the vendors. The whole sale, up to the bidding of £3600, was a mere fiction. When the vendor retains, either by express stipulation or by implied usage, a right to bid by an agent up to a fixed price, no real bidder can be deceived by such bidding. If he bids £1000, and the auctioneer declares that a bidding of £100 has been made in advance, thus raising the bidding to £1100, the real

(1) 12 Ves. 477, 481.

bidder knows that this may be a mere bidding by the vendor, and so to whatever extent the bidding may go. Every bidding may be treated as a statement made by the auctioneer, acting as agent of the vendor, that an advance has been offered to the amount of the sum bid. Where there is a real bidder, and the advance has been made by the vendor's agent pursuant to liberty expressly or impliedly reserved, the auctioneer might truly say of this latter bidding, as well as of the others, that a further sum had been bid. It is true that it was a sum bid by the vendor himself, but he had reserved a right to bid as was, *ex hypothesi*, known to the real bidder. In such a case, the bidding of the vendor by his agent is a real bidding. But how does that apply to a case like the present where there were two persons bidding for the vendor? When *Webb* bid £2500 for the property, the object of the vendors, to prevent a sale at a price less than £4000, might have been fully secured without any further bidding. The auctioneer had only, after waiting a reasonable time, to knock the property down to *Webb*, as the only bidder. When the auctioneer took on himself to make an advance of £100 on *Webb's* bidding, he must be considered as having said, Mr. *Webb* has bid £2500, but *A. B.* has bid £2600, and so on, through all the eleven biddings, up to £3600. The whole proceeding was a fiction calculated, if not intended, to deceive persons who thought of becoming purchasers. It was a false statement that up to £3600, or at all events up to £3500, there was a real bidder. I can find neither principle nor authority for holding that in such a case a vendor who, by this misrepresentation, has induced a third person to bid, can enforce his contract.

In *Bramley* v. *Alt* (1), it was expressly found that there was only one bidder for the Plaintiff, who bid only up to seventy-five guineas per acre, the price fixed by the vendors. All the other biddings were real biddings.

In *Smith* v. *Clarke* (2), there was only one person employed, with express orders to allow the lot to be sold, if a sum exceeding £750 should be bid, but not under that price. It was accordingly knocked down to a purchaser at £760; and Sir *William Grant* held this to be a fair transaction.

(1) 3 Ves. 620. (2) 12 Ves. 477.

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In *Flint* v. *Woodin* (1), Lord Justice *Turner*, then Vice-Chancellor, came to a similar conclusion.

The current of authorities has been so strong in favour of allowing a single bidder, that I might have found it difficult to go against them, though agreeing with what was said by the Lord Justice *Knight Bruce* in *Woodward* v. *Miller* (2), that abstractedly the legal doctrine is the sounder, with which opinion it is evident that the Master of the Rolls agrees. At the same time I may observe that there are not, so far as I am aware, any authorities absolutely binding me to decide that the rule which is established at common law does not hold good in equity; for no case decided by a Lord Chancellor, or by the Lords Justices, has been referred to in support of that proposition. In the present case, however for the reasons I have indicated, this question does not arise, inasmuch as there were two persons bidding on behalf of the vendors; and I am of opinion that the bill ought to be dismissed with costs.

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Nov. 20, 25.

CLARKE *v.* CLARK.

Light—Lateral Obstruction—Town.

Where a house is in a populous town, the Court will take that fact into consideration in estimating the damage done by obstructing an ancient light. The Court will not restrain the erection of a building merely because it deprives an ancient window of some portion of light; but will do so when the obstruction is such as to interfere with the ordinary occupations of life. A lateral obstruction may be such a nuisance as to be restrained.

THE Plaintiff in this case was the owner of the house, 28, *Park Street*, *Bristol*, and Mr. *Keddell* was the tenant. The Defendant was the owner of No. 27. At the back of the Plaintiff's house was a room with a large window looking to the south-west into the garden. The wall between the gardens of the houses was on the left hand side of the window, about four feet from it, and about eleven feet high, running in a direction nearly perpendicular to the window. The Defendant in September, 1864, began to erect in his garden some buildings for photography, running parallel to the

(1) 9 Hare, 618. (2) 2 Coll. 282.

garden wall, about three feet from it, and from four feet six inches to eleven feet above the wall. These buildings, though not opposite the window, were thus nearly due south of it, and obstructed the light and sun during the winter months to an extent which is mentioned in his Lordship's judgment. The Plaintiff, after some correspondence, filed a bill for an injunction, and obtained it on motion for decree heard before the Vice-Chancellor *Wood*, on the 7th of July. The Defendant appealed.

Mr. *Giffard*, Q.C., and Mr. *Everitt*, for the Plaintiffs, cited *Johnson* v. *Wyatt* (1).

Mr. *Amphlett*, Q.C., and Mr. *T. H. Terrell*, for the Defendant, cited *Isenberg* v. *East India Company* (2).

Mr. *Giffard*, in reply, cited *Soltau* v. *De Held* (3), and *Walter* v. *Selfe* (4), as to the amount of injury which would justify an injunction.

The LORD CHANCELLOR said he would read the affidavits, and consider the case. It was merely a question of how much damage was done. You could not restrain a person from obstructing a view or a certain portion of light, but only from obstructing so much light as materially to interfere with the enjoyment of the tenement. Here it was only a lateral obstruction, but that was no reason why the Plaintiff should not be protected, if he made a case for it.

Nov. 25. LORD CRANWORTH, L.C.:—

The question is, whether there has been such an interference with the light and air reaching the Plaintiff's house as to cause material annoyance to those who occupy it.

Questions on this subject are questions of degree, and are therefore very difficult to deal with. All that can be done is to attend to the special facts in every case as it arises, and then to form an opinion as to whether the obstruction complained of is such as to deprive the complaining party of such a supply of light and air as he might reasonably calculate on enjoying.

(1) 2 D. J. & S. 18; 9 Jur. N.S. 1233.
(2) 12 W. R. 450; 10 Jur. N.S. 221.
(3) 2 Sim. (N.S.), 133; 15 Jur. 1131.
(4) 15 Jur. 416.

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It is impossible to treat these as mere abstract questions. Much must turn on the nature and locality of the windows the supply of light to which has been interfered with. Persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. The steady spread of buildings in and round large towns gradually, but surely, obstructs some of the light and air which the houses in the interior of the place formerly enjoyed. And in estimating the damage, if any, occasioned to this Plaintiff, we must not omit the consideration that the place in which he complains of obstruction to light and air is a large and populous city.

With these observations, let us see what the evidence is. The window in question is a lofty window, opening to the ground, and between ten and twelve feet high; it looks south-west, upon a garden sloping upwards. The exact length of garden is not given, but from the plan it seems to extend about twenty-five yards deep in a straight line from the window, and to be about five or six yards wide. As the aspect is south-west, the sun must in its course, from the morning till past twelve o'clock, shine over the wall, which runs along the left hand side of the garden, separating it from the Defendant's garden. The wall is only eleven feet two inches high, so that before the erection of the buildings complained of, the sun in its course must have shone into the garden, and when it had advanced some way its rays would necessarily strike the Plaintiff's window. The effect of the Defendant's buildings is to prevent the direct rays of the sun from falling on the window until they have ascended high enough to shine over the new buildings, which are about sixteen feet high.

It is not suggested that in the light months of the year this occasions any material obstruction of light; but the complaint is of what happens in the winter, when the height which the sun reaches is so much below what it attains in summer.

The nature and extent of the annoyance felt is fully described by the inmates of the house.

The buildings having been erected in September, 1864, Mr. and Mrs. *Keddell*, their daughter, and a maid-servant, all made affidavits in October, and they all deposed that there was a considerable dimi-

nution of light occasioned by the Defendant's buildings; and Mr. *Keddell* stated that he expected to lose the sun during most of the winter days, and to be deprived of much light on cloudy days; and he added that in the winter he would be unable to read and write as he had been used to do.

This was the evidence given soon after the bill was filed, with a view to a motion for an injunction. In fact, however, no such motion was made; the matter stood over, and in the month of February, 1865, Mrs. *Keddell* and her daughter made a further affidavit, which is of great importance. They had then had the means of forming an opinion by experience of what the effect of the building was during the three dark months of the year—*i. e.*, the months of November, December, and January. What they say is this, that during the three months, on days when the sun shone, a very small ray of sunshine came into a corner of the parlour at about eleven o'clock, for about twenty minutes, and that no further sunlight came into the room till about one o'clock, when a slightly larger ray of sunlight came into the room for a further period of about twenty minutes. This was the state of things since the erection of the buildings; whereas during the months of November, December, and January, in former years, the sun used, they say, to shine into and illumine the whole of the parlour from soon after eleven o'clock until about half-past one, P.M. They add that the room has been very considerably darker than it formerly was on days when the sun shone, as well as on those days when it did not shine. Mr. *Keddell*, though he made an affidavit in the month of April, said nothing as to what, according to his observations, had been the effect of the buildings on the light in the rooms during the past winter.

The question is, whether on this evidence the Plaintiff is entitled to an injunction. I think not.

That the effect of the Defendant's building is to render the Plaintiff's room less cheerful, especially during the winter months, I do not doubt. The direct rays of the sun do not now reach it during that period of the year for more than about forty minutes in the day, on an average, instead of about two hours and a half. But I cannot think that this is such an obstruction of light as to amount to a nuisance. It is not—indeed it could not be contended

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that the Plaintiff's house is shut out by the Defendant's buildings from the open sky—that its occupants are driven to rely on reflected light. A mere examination of the plan shows that this is not the case. The window in question still receives greatly more light than falls to the lot of inhabitants of towns generally; and even as to the direct rays of the sun, if that were material, no complaint is made of the effect of the buildings during nine months of the year. What the Plaintiff was bound to show was, that the buildings of the Defendant caused such an obstruction of light as to interfere with the ordinary occupations of life.

Nothing of that sort is shewn. Mrs. *Keddell*, and her daughter, and the servant, it is true, say that the light has been very considerably diminished, but what they understand by being very considerably diminished they do not explain. They do not allege that they are less able to read, write, or work, or to discharge any of the ordinary duties of life.

Mr. *Keddell*, in the affidavit which he made in October, stated that the diminution of light would be so great as to prevent him from reading and writing as he had been used to do. But though he had had the experience of the winter, yet in his affidavit filed in April, he did not allude to what he had so stated in October, from which it is not unreasonable to infer that his anticipations had not been realized.

I must observe that this is not the case of a building erected opposite to the window of the Plaintiff, but on one side, at a distance of three feet from the Plaintiff's boundary wall of his house, at an angle rather more obtuse than a right angle. I am far from saying that no obstruction can be such as to amount to a nuisance, unless it is set up opposite to the light obstructed; but in estimating the quantum of inconvenience occasioned by a building, the circumstance that its effects can be felt only laterally is one not to be overlooked.

I pay little regard in this case to what is called the scientific evidence. I take it for granted that these witnesses describe accurately the quantum of obstruction which the buildings interpose. The real question is not what is, scientifically estimated, the amount of light intercepted, but whether the light is so

obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life. The evidence, in my opinion, falls far short of what was necessary to establish this, and so the bill ought, I think, to have been dismissed, and, of course, according to the ordinary rule, dismissed with costs.

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Re TRESIDDER.

L. C. 1865. *Nov.* 22.

Bankruptcy—Composition Deed—Execution, Leave to issue.

A composition deed appearing to be *bonâ fide*, and containing a provision that anything therein contained, not authorized by the Act, should only be binding on the creditors who executed, will not be invalid, because it contains provisions for payment of some small extra costs, for verification of debts, for excluding creditors who do not prove in time, or for administering the estate as on a bankruptcy.

Where a creditor disputes the validity of a composition deed:—*Semble*, that it is a proper course for him, instead of issuing execution at his own risk, to apply to the Commissioner for leave to do so, and that the Commissioner has jurisdiction to give such leave.

THIS was an appeal against an order of Mr. Commissioner *Goulburn*, dated 31st August, 1865, whereby a judgment creditor was ordered to be at liberty to issue execution against *H. J. Tresidder*, pursuant to the 198th section of the *Bankruptcy Act*, 1861.

H. J. Tresidder being indebted to several creditors, by a deed dated 10th May, 1865, and made between *Tresidder* of the one part, and one *George Butler* of the other part, assigned and assured all his estate and effects to *George Butler*, on trust to apply the same in payment of the creditors. This deed was not executed by any creditor.

On the 12th of May, a meeting of the creditors was held, at which it was agreed that the estate and effects should be assigned to two trustees, *Spicer* and *Adlard*, under the *Bankruptcy Act*. Accordingly an indenture was made, dated 16th of May, 1865, between *Tresidder* of the first part, *Butler* of the second part, *Spicer* and *Adlard* of the third part, and the several persons whose names and seals were affixed, being, or claiming to be, creditors, and all other persons creditors of the debtor *Tresidder*, upon or against whom the indenture should become valid and

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binding by reason of the provisions of the *Bankruptcy Act*, 1861, or otherwise, of the fourth part. And thereby, after reciting the previous proceedings, it was witnessed that *Butler*, by the direction of the creditors and with the privity of the debtor, did assign, and *Tresidder* did confirm, unto *Spicer* and *Adlard*, all the estate and effects of the debtor, with powers to get in and realize the same. And upon trust out of the moneys to be received, to pay all costs and expenses of investigating the affairs and of preparing and executing the deed of May 10th and the present deed. And in the next place to pay, retain, and satisfy, rateably and without preference and distributing (*sic*) the estate, and administering the assets in like manner as in bankruptcy to and amongst all the creditors: provided always, that no former dividend should be disturbed, and no liability in consequence of payment of such dividend should be incurred by the trustees, by reason, or on account of, any debt or debts due to creditors as aforesaid, and whereof the trustees should not have had notice before such dividend should have begun to be paid. And it was further provided that it should be lawful for the trustees to require the amount of any debt of any of the creditors to be verified by solemn declaration, and in the event of any of such creditors, if in *Great Britain* or *Ireland*, failing so to verify such debt for two calendar months after such requisition, such creditor or creditors should lose all benefit, dividends, and advantage to be derived from these presents. And it was further provided that the trustees might make to the debtor such allowances as might have been granted to him by the creditors if his estate had been administered in bankruptcy. The deed contained the other clauses usual in creditors' deeds, and contained a declaration that it was intended to operate as a trust deed under the provisions of the *Bankruptcy Act*, 1861, so far as the said provisions would allow, to enure for the benefit of, and be effectual against, and binding upon, all non-assenting creditors of *Tresidder*, and that if there was anything therein not authorized by the said provisions of the Act, such unauthorized thing should be obligatory only on those persons who should have executed, or acceded, or assented to this deed.

A sufficient number of the creditors executed this deed, which was duly registered, but Mr. *S. B. Somerville*, a judgment creditor for £38,

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did not execute, and applied to Mr. Commissioner *Goulburn* for leave to issue execution against the debtor, alleging that the deed was invalid. The Commissioner considered that, as *Tresidder* had on the 10th of May assigned his estate to *Butler*, who was an accountant and friend, the deed of the 16th of May could not be such a deed as was contemplated by the 192nd section of the Act, and that the debtor having already assigned his property could not make a fresh assignment of it, and therefore that the deed was void against a non-assenting creditor; the deed was also invalid as containing the clause declaring that any creditor who did not verify his debt should lose the benefit of the dividend. The Commissioner accordingly gave the creditor leave to take out execution, and allowed him his costs of the application.

A motion was now made on behalf of *Tresidder* to discharge this order.

Mr. *Cole*, Q.C., and Mr. *Lucas*, in support of the motion said, that if the deed was bad the creditor could proceed without the leave of the Court, and the Court had no jurisdiction; if the deed was good, then the order was wrong. The creditor could always proceed to issue execution if the deed was bad.

Mr. *Cookson* appeared for the trustees of the deed, but was not allowed to be heard, as the deed was not directly attacked on this motion.

Mr. *De Gex*, Q.C., and Mr. *Doria*, for the creditor:—

Where the deed is bad on the face of it, the Court of Bankruptcy will remove the difficulty, and give the creditor leave to issue execution. *Ex parte Oastler* (1), *Ex parte Roper* (1), *Ex parte Maclennan* (2). We say this deed is bad, it is exactly like that in *Ex parte Morrison* (3).

The clause depriving creditors who did not prove within ~~three~~ two months is bad, *Ex parte Speyer* (4). *Strick* v. *De Mattos* (5), *Hidson* v. *Barclay* (6). Griffith, Arrangement with Creditors (7).

Mr. *Cole* in reply.

(1) 13 W. R. 525.
(2) 13 W. R. 1046.
(3) 33 L. J. Bkcy. 47.
(4) 1 De G. J. & S. 318.
(5) 3 H. & C. 22.
(6) 3 H. & C. 9.
(7) P. 31.

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LORD CRANWORTH, L. C.:—

The only point upon which I at one time felt pressed is that on which the Commissioner seems to have acted, namely, the doubt whether the whole matter was not concluded by the execution of the former deed; and I confess, that that being removed, I do not see much difficulty in the case. As to the question, supposing the deed invalidated, whether or not a creditor could have permission under the 198th section to issue execution, that does not arise, if, as I am of opinion, the deed is good; but I rather think that he may, as that course is the most convenient to him. Suppose that a creditor wants to take out execution; it is said that he may proceed at law at his own peril; but I think it not unreasonable that he should be able to set the law in motion without incurring the great peril of doing it at his own risk. I am inclined to think, therefore, that a creditor must have power in such a case to apply to the Commissioner; but that question does not arise in this case, for I think the deed good. [His Lordship then expressed his opinion that the first deed not having been executed by any of the creditors came to nothing, and that the second deed was fair and valid, and then proceeded.] Several alleged blots have been pointed out; one is, that the trustees are to pay the costs of the preparation of this deed and of the former deed; but that is an exceedingly small matter, and seems not at all unreasonable, it was all part of one transaction; and if two deeds, such as a lease and release were used, they might as well object to paying the cost of the lease; in any view of it, it is an infinitely small matter. Another objection is to the provision for proving debts by declaration, and for the exclusion of those who should not prove within two months. That is valid against those who executed the deed; and the deed endeavoured to avoid any objection as to those who did not execute it, by saying that if there was anything which was not authorized by the provisions of the Act, such unauthorized thing should be obligatory only on those persons who did execute. What can therefore be fairer than to say, that if any of the persons who execute the deed neglect to prove their debts they shall be excluded; they have a right to exclude themselves if they

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think fit. That does not press on my mind. Another objection is to the clause which provides that no former dividends shall be disturbed. This, however, is exactly what would have been done under the bankruptcy, and it would be very hard if these deeds were to be invalidated because the parties have made provisions for doing that which would have been done in bankruptcy. Then as to the allowance to be made to the debtor. What can they do more fair? I think, therefore, that the deed shews *bona fides*, and as to enforcing debts it leaves the parties where they were before, because they anxiously stipulate that anything not authorized by the Act of Parliament shall not bind those who are not parties to the deed. Though many of these deeds are attended with fraud, there seems to be nothing of the kind in this, and there is no reason why such deeds should not be supported. I must discharge with costs the order of the Commissioner which is appealed from.

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L. C. 1865. *Nov.* 20, 21.

Incomplete Gift—Volunteer—Parol declaration of Trust.

A father put a cheque into the hand of his son of nine months old, saying, "I give this to baby for himself," and then took back the cheque and put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, and the cheque was found amongst his effects:—

Held, under the circumstances, that there had been no gift to or valid declaration of trust for the son.

A parol declaration of trust in favour of a volunteer may be valid, and may be enforced in equity.

The dictum in *Scales* v. *Maude* (6 De G. M. & G. 51; 1 Jur. N.S. 1147), that a declaration of trust in favour of a volunteer is invalid, is not good law.

ROBERT JONES was an ironmonger at *Pembroke*, and had children by a first wife, and one son, an infant about nine months old, by a second wife. It appeared from the affidavits, as to which there was no contradiction, that *Robert Jones* went to *Birmingham* for a few days on business, and returned on the 12th of September, 1863. On the day of his return he was in the kitchen of his

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house with his wife and infant child and the child's nurse, and the nurse said, "You have come back from *Birmingham*, and have not brought baby anything;" on which he said, "Oh, I gave him a pair of boots, and now I will give him a handsome present." He then went up-stairs, and brought down a piece of paper, which was a cheque for £900, and said, "Look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it. He then placed the cheque in the baby's hand, whereupon his wife said, "Don't let him tear it," and he answered, "Never mind if he does; it is his own, and he may do what he likes with it." He then took the cheque away from the child, and said to the nurse, "Now, *Lizzie*, I am going to put this away for my own son," and locked it in an iron safe. He had received this cheque in payment of a mortgage a short time before, and he had expressed to Mr. *Lock*, his solicitor, his intention of adding £100 to it, and investing it for the benefit of the infant. On the 18th of September he met Mr. *Lock*, and said, "I shall come to your office on Monday to alter my will, that I may take care of my son." On the same day he died. Mr. *Lock*, one of the executors, found the cheque in the safe, and obtained payment of the money as part of the estate.

Robert Jones had made a will before the birth of the infant, leaving an annuity to his wife, and giving the rest of his property for the benefit of his other children. A suit was instituted for the administration of his estate, and a claim was carried in against the estate by the mother, on behalf of the infant, for the £900 as having been given to the infant. The cheque was not produced or made evidence.

The Vice-Chancellor *Stuart* held that there had been a valid declaration of trust by the father for the infant, and that the claim must be allowed.

The legatees, except the widow, appealed.

Mr. *Bacon*, Q.C., and Mr. *Waller*, for the Appellants:—

There has been neither a complete gift nor an effectual declaration of trust. There are many cases in which the intention of the donor has been clear, and yet the gift has been held void,

because it was incomplete: *Antrobus* v. *Smith* (1). *Edwards* v. *Jones* (2) was a stronger case. In *Dillon* v. *Coppin* (3) the principles are clearly laid down. Nor has there been a valid declaration of trust: *Hughes* v. *Stubbs*, (4) *Smith* v. *Warde*, (5) *Patterson* v. *Murphy* (6), *Scales* v. *Maude* (7). The case is quite different where there has been a change of legal ownership: *Milroy* v. *Lloyd* (8). In *Ellison* v. *Ellison* (9) the correctness of a dictum in *Scales* v. *Maude* is doubted, in which your Lordship is reported to have said that a declaration of trust in favour of a volunteer would not be valid. No doubt this testator intended to provide for his son either by settling this money or leaving it to him by will, but his intention was never carried into effect. Can any one believe, on such evidence, that he intended then and there to deprive himself of all control over this money, and that a bill might have been next day maintained on behalf of this infant to take away the £900 entirely from the testator, and secure it to the infant?

Mr. *Malins*, Q.C., and Mr. *Bird*, for the infant:—

The cases cited all proceed on the principle that if a man intends to make a gift, or to create a trust by transferring shares or other property, and does not do so, the Court holds the transaction incomplete, and will not assist a volunteer. But a man may always make a valid gift by a mere declaration of trust: *Ex parte Pye* (10). The distinction is refined, but is well established: *Donaldson* v. *Donaldson* (11), *M'Fadden* v. *Jenkins* (12). Similar gifts have been held good in many cases: *Searle* v. *Law* (13), *Benbow* v. *Townend* (14), *Way's Trusts* (15), *Bailey* v. *Boulcott* (16), *Kekewich* v. *Manning* (17). The testator had made a clear and absolute gift; but as an infant could not keep or use a cheque, he took it

(1) 12 Ves. 39.
(2) 1 My. & Cr. 226.
(3) 4 My. & Cr. 647.
(4) 1 Hare, 476.
(5) 15 Si. 56.
(6) 11 Hare, 91;
(7) 6 D. M. & G. 43;
(8) 31 L. J. Ch. 79;
(9) 1 Wh. & Tu. 215.
(10) 18 Ves. 140.
(11) Kay, 711.
(12) 1 Hare, 458; 1 Ph. 153.
(13) 15 Si. 95.
(14) 1 My. & K. 506.
(15) 10 Jur. (N. S.) 836;
(16) 4 Russ. 345.
(17) 1 D. M. & G. ~~740.~~

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back to preserve it, and take care of the money. What more could he do to make a valid gift under the circumstances?

Mr. *Kay*, for the executors.

In the course of the argument the LORD CHANCELLOR said that the dictum attributed to him in *Scales* v. *Maude* (1) must have had reference to the special circumstances of the case; and though his Lordship considered the decision in that case to be right, the dictum was clearly wrong as a general statement of the law. There could be no doubt that there might be a valid declaration of trust in favour of a volunteer.

Mr. *Bacon*, in reply.

LORD CRANWORTH, L.C.:—

This is a special case, in which I regret to say that I cannot bring myself to think that, either on principle or on authority, there has been any gift or any valid declaration of trust. No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of a real estate or by delivery of a chattel; and there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary. If I give any chattel that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me; they all turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from a Court of equity if they claimed as volunteers. But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not. Therefore the question in each case is one of fact; has there been a gift or not, or has there been a declaration of trust or not? I should have every inclination to sustain this gift, but unfortunately I am unable to do so; the case turns on the very short question whether *Jones* intended to make a

(1) 6 D. M. & G. 51.

declaration that he held the property in trust for the child; and I cannot come to any other conclusion than that he did not. I think it would be of very dangerous example if loose conversations of this sort, in important transactions of this kind, should have the effect of declarations of trust.

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[His Lordship then commented on the evidence, and said that no doubt it was a fair representation of what actually took place, and that the father really had an intention of settling something on the child, and that his giving the note to the child was symbolical of what he meant to do; but it was not his meaning to enable the child, by his next friend, to bring an action of trover for the cheque, or file a bill for the £900, but he merely meant to say that now he could make a provision for the boy; and what he said to the solicitor was quite consistent with it.]

It was all quite natural, but the testator would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it. It all turns upon the facts, which do not lead me to the conclusion that the testator meant to deprive himself of all property in the note, or to declare himself a trustee of the money for the child. I extremely regret this result, because it is obvious that, by the act of God, this unfortunate child has been deprived of a provision which his father meant to make for him.

Costs of all parties out of the estate.

MATHERS *v.* GREEN.

L. C. 1865. *July* 13, 14, 15; *Nov.* 4.

Patent—Joint Grantees—Patent Law Amendment Act, 1852 (15, 16 *Vict. c.* 83).

Where a Patent for an invention is granted to two or more persons in the usual form, each one may use the invention without the consent of the others.

As to the rights of such joint grantees to the profits made by granting licences—*Quære.*

THE bill in this case was filed by *Robert Mathers* for the purpose of enforcing his rights in two patents, dated respectively the 20th of December, 1861, and the 31st of December, 1861,

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which had been granted to him jointly with the Defendants *Thomas Green* and *Willoughby Green*, under the following circumstances :—

The Defendant, *Thomas Green*, had for some years carried on the business of a manufacturing engineer at the *Smithfield* Iron Works, at *Leeds*, and was particularly engaged in the manufacture and sale of mowing-machines, for improvements in which a patent had been granted to him on the 6th of June, 1859. The Defendant, *Willoughby Green*, was his workman, and had been, since January, 1863, in partnership with him.

The Plaintiff was a mechanical engineer, and was often consulted by *Thomas Green* and other engineers, as to improvements in their machinery. In September, 1861, he went to *Leeds* for the purpose of assisting the Defendants in the manufacture of mowing-machines, in which he suggested certain improvements.

In order to secure these and other improvements in the Defendants' works, two patents were taken out. The first, which bore date the 20th of December, 1861, was for "Improvements in lawn-mowing, rolling, and collecting machines;" and that which bore date the 31st of December, 1861, was for "Improvements in chains for giving motion to chain-wheels, and in giving motion to machinery."

The letters patent in both these cases were granted to *Thomas Green*, *Willoughby Green*, and *Robert Mathers*, their executors, administrators, and assigns, and it was contended by the Plaintiff that it was intended that the three grantees should be jointly interested in the patents. The Defendants, however, alleged that the services of the Plaintiff had been engaged by him at a salary of £200 per annum, and that there was no intention of giving him any share in the profits of the patents for the working of which the Defendant, *Thomas Green*, advanced all the capital. And they stated that their only reason for inserting his name in the patent was that they were informed by Messrs. *Carpmael*, the patent agents, that as they were all joint inventors, the patent must be taken out in their three names. On this subject the evidence was conflicting.

The Plaintiff remained in the service of the Defendant, *Thomas Green*, until the 25th of March, 1862, when he removed to

London, in order to superintend the branch of the Defendants' business, which was carried on at No. 2, *Victoria Street, Holborn.*

The evidence was, however, conflicting as to the terms on which the Plaintiff undertook the business; and one branch of the relief sought by the bill related to his remuneration for managing the *London* business.

The Plaintiff filed the present bill in May, 1863, praying, among other things, for a declaration that he was entitled to share equally with the Defendants in the two patents, and claiming his share of the profits and royalties since the 21st of January, 1863.

The Master of the Rolls, before whom the cause was heard, held that the patents were the joint property of the Plaintiff and the Defendants, and that he was entitled to an equal share of such parts of the profits of the manufacture as were attributable to the invention, as well as to an equal share in the royalties arising from a licence alleged to have been granted (1).

From this decree the Defendants appealed.

Mr. *Southgate*, Q.C., and Mr. *Kingdon*, for the Plaintiff:—

With respect to the Plaintiff's share of the patent, we contend that, in the absence of any written agreement, the grant of the patent to the three is conclusive. Mere parol evidence is not sufficient. We rely on the 15 & 16 Vict., c. 83, s. 35. If the joint right of the patentees is conceded, the only mode of making it effectual is to give them a joint interest in the profits. Otherwise a joint-inventor, like the Plaintiff, who is not a manufacturer, would have no opportunity of gaining any advantage from the patent. Could it be contended that one joint patentee may grant licences without his co-patentees participating in the royalties? A joint owner of a ship cannot use the ship without the consent of the others. Nor can one joint author of a book publish an edition without the consent of his fellow-author. *Hancock* v. *Bewley* (2), *McMahon* v. *Burchell* (3), *Henderson* v. *Eason* (4), *Leake* v. *Cordeaux* (5), *Jefferys* v. *Boosey* (6). The difficulty of taking the

(1) Reported 34 Beav. 170.
(2) Joh. 601.
(3) 2 Ph. 127.
(4) 12 Q. B. 986; 17 Q. B. 701.
(5) 4 W. R. 806.
(6) 4 H. L. C. 815, 1 Jur. N.S. 615

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account is no objection to the relief prayed. *Crosley* v. *Derby Gaslight Company* (1).

Mr. *Selwyn*, Q.C., and Mr. *Phear* for the Defendants:—

The evidence proves that the Plaintiff was not intended to have a joint share in the patent. The capital was all advanced by the Defendant, *Thomas Green*, and the only reason for the Plaintiff's name being introduced was that the grant might be regular. But if he was jointly entitled, his only right was to use the patent for his own benefit; and he has no right to restrain the co-owners from working it independently, or to call for an account of their profits. *Re Russell's Patent* (2).

Mr. *Southgate*, in reply.

Nov. 4. LORD CRANWORTH, L.C., after stating the object of the Bill and the main facts of the case, as mentioned above, continued:—

On the first branch of relief sought by the bill, the Defendants insisted that the patents, though granted to the three jointly, belonged solely to the Defendant, *Thomas Green*, who had paid all the cost of obtaining them, and that this had been acknowledged by the Plaintiff. There was conflicting evidence on this subject, on which the Master of the Rolls decided in favour of the Plaintiff. In the view I take of this case it is not necessary that I should come to any positive decision on this point; but the inclination of my opinion is in conformity with that taken by his Honour. Perhaps I ought rather to say, that whatever the truth may be, I incline to think there is not sufficient evidence to rebut the *primâ facie* presumption arising from the fact that these letters patent were granted to the three. Where such a grant has been made to two or more as joint inventors, it is dangerous for any Court to allow one of the grantees to set up a title against the others, founded on mere parol evidence or inference from doubtful conduct. The grantee who, in such a case, claims an exclusive right, ought to obtain written evidence on the subject, as was pointed out by Mr. *Carpmael* to *Thomas Green* before the

(1) 3 My. & Cr. 428. (2) 2 De G. & J. 130.

grants of the letters patent were made; and if by omitting to take this precaution he is put to loss, he has only himself to blame But in the present case I do not feel it incumbent on me to pronounce a positive opinion as to whether the Plaintiff was or was not beneficially interested in the patents; for even if he was, he did not, in my opinion, become thereby entitled to any relief in this suit.

The Master of the Rolls by his decree has declared that the Plaintiff is entitled to one-third share of the letters patent, and to one-third share of the profits arising from the use of the inventions patented, subsequently to the 21st of January, 1863; and also to one-third part of all money which has arisen from licences granted under the patents.

With great deference to the Master of the Rolls, I do not think that he is entitled to any part of this relief. With respect to moneys received from royalties, the Defendants deny that they have received anything, and this is not met by any evidence on the part of the Plaintiff, though it would have been easy for him to have done so, for the only licence alleged by him to have been granted is one to certain gentlemen trading under the firm of *Cookey & Co.*, who must have been able to prove payment by them on account of royalty to the Defendants, if any such payment had been made. The case therefore comes to this—is the Plaintiff entitled to relief on the score that the Defendants have made profit by using the patented inventions in the manufacture and sale of their own goods? I think not. The letters patent grant to the three, their executors, administrators, and assigns, that they and every of them by themselves, their servants and agents, or such others as they may agree with, and no others, shall, for the term of fourteen years, use, exercise, and vend the said invention. The right conferred is a right to exclude all the world other than the grantees from using the invention. But there is no exclusion in the letters patent of any one of the patentees. The inability of any one of the patentees to use the invention, if any such inability exists, must be sought elsewhere than in the letters patent. But there is no principle, in the absence of contract, which can prevent any persons not prohibited by statute from using any invention whatever. Is there then any implied contract where

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two or more persons jointly obtain letters patent that no one of them shall use the invention without the consent of the others, or if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss.

This would be to place the parties in a relation to each other which I think no Court can assume to have been intended in the absence of express contract to that effect. I am of opinion therefore, that the decree is wrong in declaring that the Plaintiff is entitled to one-third share of the profits made by the Defendants from the use of the patents; and that he has failed altogether in establishing any title to relief so far as relates to the patents. The conclusion at which I have thus arrived is in strict conformity with what was done in the case of *Re Russell's Patent* (1), cited and commented on during the argument. In that case two persons were applying for patents for the same invention, *Russell*, the master, and *Muntz*, the servant. *Russell* applied to have the great seal affixed to his letters patent. *Muntz* opposed on the ground that the invention was his, not his master's. It seemed to me on the evidence that the invention was partly that of *Russell*, the master, and partly that of *Muntz*, his servant; and I therefore decided that the great seal should not be affixed to the letters patent of *Russell* except on the terms that they should be assigned to a trustee for *Russell* and *Muntz*, *Muntz* agreeing to abandon his application for his own letters patent. To this the parties agreed, and it appears that on a subsequent day a discussion took place as to the form of the proposed trust, and it was ordered, in conformity with what I consider to be the rights of two persons jointly obtaining letters patent, that the letters patent should be assigned to two trustees, and that each patentee should have a free licence to himself and his partners. That case, however, was so much one of arrangement between the parties, that if I had not been satisfied of the correct-

(1) 2 De G. & J. 130.

ness of the ground on which it rested, I should have paused before I relied on it as an authority.

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[His Lordship then proceeded to consider the effect of the evidence on the other questions in the cause, and said that he was of opinion that on this second branch of the case, as well as on the first, the Plaintiff wholly failed to establish any title to relief, and consequently his bill must be dismissed with costs.]

NUNN *v.* FABIAN.

L. C. 1865 *Nov.* 2, 3, 9.

Statute of Frauds—Part Performance—Agreement for Lease—Increased rent—Laches.

A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—

Held, that this constituted a sufficient part performance of the agreement to take the case out of the *Statute of Frauds*, and specific performance was decreed.

THE bill in this case was filed for the specific performance of an agreement to grant a lease of two houses at *Brighton*. The facts were as follows:—

In May, 1862, *Edward Bruton* (since deceased) was seized of two houses, Nos. 59 and 60, *Western Road*, *Brighton*, and a house in *Castle Street* at the back of them. The Plaintiff, *John Nunn*, was the occupier of No. 60, *Western Road*, and of part of the house in *Castle Street*, as yearly tenant, at the rent of £65; and *George Wymark* was the occupier of No. 59, *Western Road*, and the rest of the house in *Castle Street*, as yearly tenant, at a rent of £50.

The Plaintiff alleged that in that month negociations took place between himself and his landlord respecting a grant to him of a lease of the whole of the premises, and that *Bruton* offered to grant a lease of the three houses for twenty-one years at a gross rent of £130, with the option of purchasing the freehold for £2500, either at once or within a limited period. No memorandum in writing of this offer appears to have been made, but on

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the 27th of May the Plaintiff sent to Mr. *Bruton* the following letter:—

"DEAR SIR,—I am sorry that I have not given you an answer before; but in consequence of my not being able to decide as soon as I had promised to do to my friend, she thought I had given the matter up, and accordingly put it into another channel. Since then I have been waiting for an answer from her, which I have now got, stating that she has let another party have the money. Therefore I will take the lease for twenty-one years, with a clause to purchase at the terms given; the period to extend as long as you can."

The Plaintiff also alleged that it was verbally agreed at the same time that, in consideration of the grant of the lease, the Plaintiff should make certain alterations in the house, No. 60, *Western Road;* but the particulars of such alterations were not shown by the evidence.

On the receipt of this letter *Bruton* called upon his solicitor, Mr. *George Faithfull* (who had since died), and showed him the letter, and at the same time gave him instructions to prepare the draft of a lease. Mr. *Faithfull* wrote on the back of the Plaintiff's letter the following memorandum, which was produced, and proved to be in Mr. *Faithfull's* handwriting:—

"*Nunn* is a confectioner. Nos. 59 and 60, *Western Road*, and No. 1, *Castle Street.* Rent £130, payable quarterly. Term 21 years, from 24th of June. Purchase in 10 years. Price £2500. No. 59, and the back portion of No. 1, *Castle Street*, is occupied by Mr. *Wymark* at a rent of £50, payable quarterly, as yearly tenant. The rest is in *Nunn's* occupation. In case of fire the landlord to rebuild."

Then followed a memorandum of *Bruton's* title to the freehold.

Mr. *Faithfull* accordingly prepared the draft of a lease on the terms mentioned in the memorandum, and on the 24th of June the Plaintiff accompanied *Bruton* to Mr. *Faithfull's* office, when the draft lease, which was in the handwriting of Mr. *Faithfull's* clerk, was read to him, and, after some alterations were made in it, the principal of which was the extension of the period allowed for purchasing the freehold from ten to fourteen years, it was

approved by all parties, and Mr. *Faithfull* was directed to have the lease engrossed for execution.

In the meantime the Plaintiff laid out a considerable sum of money, amounting to more than £100, in putting a new shop front and making other alterations in No. 60, *Western Road;* and he stated that *Bruton* occasionally inspected the work, and approved it, while it was in progress.

On the 14th of January, 1863, the Plaintiff paid *Bruton* £20 as the balance of the quarter's rent due at Michaelmas, 1862. *Wymark* had previously paid *Bruton* £12 10*s.* for the quarter's rent on his holding, which, with the £20 paid by the Plaintiff, made up £32 10*s.*, being the amount of a quarter's rent of the whole premises at the rate of £130 a year according to the terms of the proposed lease. The receipt given by *Bruton* was in the following terms:—

"Received the 14th day of January, 1863, of Mr. *J. Nunn,* the sum of £20 for balance of rent due 29th of September last, for 60, *Western Road, Brighton.*"

"E. BRUTON."

The lease was engrossed, and several appointments were made to execute it, which failed in consequence of *Bruton's* engagements; and on the 16th of January *Bruton* made an appointment with the Plaintiff to meet him at Mr. *Faithfull's* on the following day; but on the afternoon of the same day *Bruton* died suddenly.

By his will he gave the residue of his real and personal estate (including the houses in question) to the Defendants upon trust to sell, and appointed them his executors. They proved the will on the 12th of March, 1863.

The Defendants refused to execute a lease to the Plaintiff. In October, 1863, they advertised the property for sale; but withdrew it on the receipt of a notice from the Plaintiff.

In December, 1863, they again advertised the houses for sale without regarding the claim of the Plaintiff, and he accordingly filed the present bill on the 23rd of January, 1864, praying for specific performance of the agreement for a lease and an injunction to restrain the sale.

The Defendants by their answers relied upon the *Statute of*

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Frauds; and they also insisted that the Plaintiff had been guilty of laches in enforcing his rights. The Plaintiff contended that the agreement had been partly performed, relying on the alterations which he had made in the house, and the payment of rent on the footing of the new agreement. The Master of the Rolls dismissed the bill, thinking that there was considerable difficulty with respect to the terms of the parol agreement, having regard to the circumstance that the lease, as engrossed, was silent as to the alterations in the house. From this decision the Plaintiff appealed.

Mr. *Baggallay*, Q.C., and Mr. *H. F. Bristowe*, for the Plaintiff:—

On the question of part performance we rely on *Lincoln* v. *Wright* (1), *Wills* v. *Stradling* (2). The landlord had stood by and seen his tenant lay out money on the faith of the agreement, and even if this did not amount to part performance it was ground for relief in equity, *Mundy* v. *Jolliffe* (3).

With respect to the charge of laches, there was no case in which such a defence had been supported, unless the Plaintiff had delayed for more than a year. Here the Defendants did not prove the will till March, 1863, and afterwards they gave way to the Plaintiff's claim, by withdrawing the property when advertised for sale. The Plaintiff, being in possession, had not the same reason to take active measures as if he had been out of possession.

Mr. *Selwyn*, Q.C., and Mr. *Speed*, for the Defendants:—

The acts relied on did not necessarily bear reference to the agreement. The payment of rent was ambiguous. It might have been in consequence of the increased value of No. 60. The alterations in the shop front had no connection with the agreement. The lease, as drawn, was silent respecting them. No doubt there was a verbal promise on the part of *Bruton* to grant a lease, but he could have revoked it at any time before his death. *Jackson* v. *Oglander* (4). On the question of laches, they referred to *Southcomb* v. *the Bishop of Exeter* (5).

Mr. *Baggallay*, in reply.

(1) 4 De G. & J. 16, 5 Jur. N.S. 1142 (2) 3 Ves. 378. (3) 5 My. & Cr. 167.
(4) 13 W. R. 936. (5) 6 Hare, 213.

Nov. 9. Lord Cranworth, L.C.:—

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This is a bill for the specific performance of an agreement for a lease for twenty-one years. The agreement was by parol, but the Plaintiff seeks to avoid the *Statute of Frauds* by an allegation of part performance. Now, I should yield to no judge of a Court of equity in my desire to refrain from extending the cases in which the Court gets over the *Statute of Frauds;* but there being an established rule on this subject, a judge ought not to depart from it. The Court is bound to consider, first, whether there was a parol agreement; and secondly, if so, whether there has been part performance of it; and then, if there has been part performance, it is the duty of the Court to act upon the established principle, and to decree performance of the contract.

[His Lordship then shortly stated the facts of the case as given above, and continued]:—The question, therefore, is, whether there was an agreement for a lease, the terms of which were settled by parol before the death of *Bruton;* and if so, whether there has been part performance of such agreement.

The Plaintiff's case is, that the agreement was made in the previous spring, although the lease was not settled till December. This is sworn to by the Plaintiff; but I agree with the Master of the Rolls, that in such a case the facts must be watched carefully to see what confirmation there is of the Plaintiff's assertion. And in looking through the evidence with this view the Court is particularly careful to see if there are any documents which confirm it. Now, I think that in this case there are two very important documents: the first is the letter from the Plaintiff to *Bruton*, of the 27th May, 1862, in which the Plaintiff replies to a previous offer by *Bruton;* and says that he agrees to take a lease for twenty-one years, with an option of purchasing the freehold. At that time all that had been agreed upon was that there should be a lease for twenty-one years and an option of purchasing the freehold at a period not yet determined. This letter was submitted by *Bruton* to his solicitor, Mr. *Faithfull*, and that gentleman wrote on the back of it the following memorandum. [His Lordship then read the memorandum as set forth above.]

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We have, therefore, the statement by the Plaintiff of a parol agreement, confirmed by showing that he replied in writing to his landlord's offer, and that his letter was referred to the landlord's solicitor, who wrote such notes upon it as a solicitor would naturally do if an agreement had been really entered into.

In conformity with this we find the draft of a lease in the handwriting of a clerk of Mr. *Faithfull*, with a stipulation in it that the tenant was to have the option of purchasing within ten years, which agrees with Mr. *Faithfull's* indorsement. The Plaintiff says, in his affidavit, that a meeting took place to settle the draft lease on the 24th June; that some alterations were made in the handwriting of Mr. *Faithfull*, and that the alterations were principally verbal, except that the period of ten years was extended to fourteen years. This being so, nothing remained but that the lease should be ingrossed and executed. The Plaintiff says, that *Bruton* told him that he expected him to make some alterations in the house—what they were to be does not appear; but, in fact, he laid out more than £100 in altering the shop-front, which he says was done under the eye, and with the sanction, of his landlord; and he relies on this expenditure as part performance of the contract.

Now, I do not think we can exactly call this part performance. The parol agreement was embodied in the lease, which is silent about the alterations. But although it was not part performance, it is important as showing that there was an agreement for a lease. No yearly tenant would have spent that amount of money in improving the front of his house without some such agreement as is here alleged. It is certainly evidence that there was some agreement; I am not sure that even beyond this the fact of a landlord standing by and seeing his tenant laying out money on the faith of a promise of a lease, might not raise an equity, though not in a strict sense part performance, by analogy to the equity which arises in the case of a person standing by and seeing his neighbour spending money on his land. *Gregory* v. *Mighell* (1).

But here I am not driven to rely on this evidence, because I think that there was clear part performance by payment of the Michaelmas rent at the increased rate fixed by the agreement. The facts were these: according to the agreement a quarter's rent would be

(1) 18 Ves. 328, and see Ramsden v. Dyson, 1 H. L. 129. 12 Jur. N. S. 506.

£32 10*s.* *Wymark* held one of the houses at an annual rent of £50; if the lease had been granted he would have had to pay £12 10*s.* to the Plaintiff, and the Plaintiff would have had to pay £32 10*s.* to *Bruton.* But *Wymark* paid his quarter's rent, £12 10*s.*, to *Bruton,* leaving £20 to be paid by the Plaintiff, and the Plaintiff did, in fact, pay £20.

It was, indeed, suggested that the £20 may have been paid by the Plaintiff, by reason of the increased value of his own house; but this is inconsistent with the form of the receipt, in which the payment is expressed to be the "balance" of the quarter's rent. Now, the rent had been all paid up to the 24th of June, 1863, and, therefore, there was nothing to which the word "balance" could apply except the payment by *Wymark* of his share of the rent; I think, therefore, that this payment is strongly corroborative of the agreement as alleged. It is true that *Wymark* paid the rent to *Bruton* and not to the Plaintiff. But that was a mere difference of form; substantially, the payment carried into effect the rights of the parties according to the terms of the lease.

I therefore differ from the Master of the Rolls in his view of this case; I think there is a parol agreement clearly proved, and part performance to take it out of the *Statute of Frauds.*

It is, however, urged that the Plaintiff has been guilty of what amounts to laches, because *Bruton* died in January, 1863, and the Bill was not filed till January, 1864. But the question of laches must depend on the special circumstances of each case, and I think that here the delay has been very venial. The Plaintiff was in possession and paid his rent, and the devisees, although they refused specifically to perform the agreement, did nothing to disturb his possession until the attempted sale in October, 1863.

On the whole, therefore, I think that the Plaintiff is entitled to a decree for specific performance; but I shall give no costs either in the Court below or of the appeal, on account of the Plaintiff not having taken proceedings sooner.

L. JJ.
1865
Nov. 10, 24.

LOW *v.* ROUTLEDGE

Copyright—Alien—Temporary Residence within the realm—Colony—Canada— (5 & 6 *Vict.* c. 45).

An alien friend residing temporarily in any part of the British dominions, and during the time of such residence publishing in *England* a work, of which he is the author, acquires a copyright under the 5 & 6 Vict. c. 45. And this is the case although he may be residing in a British colony, with an independent legislature, under the laws of which he is not entitled to copyright.

THE Plaintiffs in this suit were the members of the firm of *Sampson Low & Co.*, booksellers, of *Ludgate Hill*, and *Maria Susanna Cummins*, of *Dorchester*, near *Norton*, in the *United States of America;* and the bill was filed to restrain the Defendants, the members of the firm of *Routledge & Co.*, booksellers, of *Ludgate Hill*, from infringing the copyright of a book called "Haunted Hearts," of which the Plaintiff, *Maria Susanna Cummins*, was the author.

This lady was a native of the *United States of America;* but being desirous of having her work published in this country, and of acquiring a *British* copyright therein, she transmitted the manuscript of the "Haunted Hearts" to the Plaintiffs, Messrs. *Sampson Low & Co.*, for publication by them; it having been arranged that she should, prior to such publication, go to *Montreal*, in *Canada*, and continue there until and during the publication of the work in this country, and that Messrs. *Sampson Low & Co.* should become the purchasers of the British copyright so to be acquired.

Accordingly, *Maria S. Cummins* went to *Montreal*, and was living there at the time of the publication of "Haunted Hearts" in *London*, which took place on the 23rd of May, 1864. The work was an original work, and was published in two volumes, price 16*s.*, and on the same day the publishers deposited a copy in the *British Museum*.

On the 4th of June the publishers registered the publication of the work, and the assignment of the copyright to them, at *Stationers' Hall;* but in the entry of proprietorship the date of publication was stated erroneously to be the 25th of May, 1864.

In the same month the Defendants brought out an edition of "Haunted Hearts" in a cheap form, price 2*s.*, and the Plaintiffs, on the 17th of June, filed a bill to restrain the violation of the copyright.

To this bill the Defendants put in a general demurrer, contending that the author of the work, being an alien, could have no British copyright therein. Vice-Chancellor *Kindersley,* before whom the demurrer was argued, was of opinion that the Defendants failed in their principal ground of demurrer, but held that the Plaintiffs could not sustain the bill on account of the variance in the date in the register at *Stationers' Hall.* His Honour therefore allowed the demurrer.(2)

The publishers thereupon registered the publication and assignment afresh at *Stationers' Hall,* and on the 2nd of March the Plaintiffs filed the present bill, praying the same relief as in the former suit. The Vice-Chancellor overruled a demurrer without hearing any argument, and, on the motion of the Plaintiffs, made an order for an interlocutory injunction. From this order the Defendants appealed, but their Lordships directed that the appeal motion should stand over till the hearing of the cause, which they permitted to be brought on, in the first instance, before themselves.

It was admitted that the author had acquired no copyright under the *Canadian Copyright Act* (4 & 5 Vict. c. 61).

Mr. *Baily,* Q.C., and Mr. *Hardy,* for the Plaintiffs:—

Residence of the author, being an alien, in the British dominions at the time of publication is sufficient to satisfy the *Copyright Act* (5 & 6 Vict. c. 45). In *Jefferys* v. *Boosey* (1), the dicta of the majority of the judges and of the law lords are clear on that point. An alien residing temporarily in the British dominions owes a temporary allegiance to the Queen, and is entitled to all rights of British subjects, except those from which aliens are expressly

(1) 4 H. L. C. 815. / Jur N.S. 615.

(2) Reported 10 Jur N.S. 922. 12 W.R. 1069.

L. JJ. 1865 LOW v. ROUTLEDGE.

exempted—as, for instance, the right to hold real property: *Ollendorff* v. *Black* (1), *Delondre* v. *Shaw* (2).

The present *Copyright Act* differs from the first Act (8 Anne, c. 19), under which *Jefferys* v. *Boosey* was decided in being expressly extended to the colonies, and also inasmuch as the stress is laid on the meaning of the word "book," not on the meaning of "author" (section 2). So that the place of publication is the test of the right: *Boucicault* v. *Delafield* (3).

If the Defendants' contention is correct, a foreign author publishing abroad will be in a better condition under the *International Copyright Acts* (4) than if he published in this country.

The Acts of the Canadian Legislature, limiting the rights of authors to copyright in *Canada*, do not affect the question. We admit, for the purpose of argument, that the author did not comply with the provisions of the Canadian Act (4 & 5 Vict. c. 61), and that she acquired no copyright in *Canada*. But the Canadian Acts could not affect her rights under the imperial law. The *Canada Government Act* (3 & 4 Vict. c. 35, s. 3) enacts that the Canadian Legislature shall have no power to make any laws "repugnant to any Act of Parliament made or to be made."

Mr. *Shapter*, Q.C., and Mr. *Schomberg*, for the Defendants:—

The expression referred to in the *Canada Government Act* means that the Canadian Legislature shall make no law repugnant to any imperial Act in existence at the time when such law might be made; but the Canadian Legislature could not be supposed to foresee what Acts the imperial Legislature might pass at any future time. The *Copyright Act* (5 & 6 Vict. c. 45) cannot by a side wind repeal the *Canadian Copyright Act*. The general words "all colonies," in the 2nd section of the English Act, do not include such colonies as have an independent legislature.

The Plaintiff was in the position of an alien publishing in *England* while residing abroad; and *Jefferys* v. *Boosey* is an authority in our favour. The word "author" in the present *Copyright Act* must be held to mean "British author," as was held under the statute of *Anne*. The temporary residence of a foreigner within

(1) 4 De G. & S. 209.
(2) 2 Sim. 237.
(3) 1 H. & M. 597, 9 Jur. N.S. 1282.
(4) 1 & 2 Vict. c. 59; 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12.

the British dominions is not sufficient to place him in a position to acquire a copyright. His allegiance is temporary, and his rights are temporary and local only: *Calvin's Case* (1), *Donegani* v. *Donegani* (2), *Re Adam* (3), *Brook* v. *Brook* (4), *Hope* v. *Hope* (5).

Mr. *Baily*, in reply.

Nov. 24. SIR G. J. TURNER, L.J.:—

This case comes before us on a motion to dissolve an injunction granted by the Vice-Chancellor, Sir *Richard Kindersley*, and by arrangement between the parties, on the original hearing of the cause. The sole question we have to determine is whether an alien friend coming into one of the British colonies (in this case, into *Canada*), and residing there during and at the time of the publication in this country of a work composed by the alien, and first published in this country, is entitled to copyright in this country in the work so published. This question depends upon the statute 5 & 6 Vict. c. 45, particularly sections 2, 3, and 29.

By section 2, it is enacted that the words "British dominions" shall be construed to mean and include all parts of the *United Kingdom*, the islands of *Jersey* and *Guernsey*, all parts of the *East* and *West Indies*, and all the colonies, settlements, and possessions of the Crown which now are, or hereafter may be acquired. By section 3, "the copyright in every book which shall, after the passing of this Act, be published in the lifetime of its author, shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns." By section 29, the Act was to extend to the *United Kingdom*, and to every part of the British dominions.

Looking to these sections, there can, I think, be no doubt that the provisions of this statute extend to *Canada*; and if this be so,

(1) 7 Rep. 1.
(2) 3 Knapp. 63.
(3) 1 Moo. P. C. 460.
(4) 3 Sm. & Giff. 481; s. c. 9 H. L. Ca. 193; 4 Jur. N.S. 317. 7 Jur. N.S. 422.
(5) 8 D. M. & G. 731.

L. JJ. 1865 LOW v. ROUTLEDGE.

it is obviously very difficult to say that an author in *Canada* is not entitled to the benefits given by the statute. The meaning of the word "author" is in no way limited by the statute, and, on the contrary, the provisions of the statute favour the most extended construction of that word. The 6th section of the statute more especially favours this extended construction. It provides for the delivery, for the use of the *British Museum*, of a printed copy of every book within one month after the day on which the book shall first be published within the bills of mortality, or within three months if the book shall first be published in any other part of the *United Kingdom*, or within twelve months after it shall first be published in any other part of the British dominions; thus evidencing that books published in any part of the British dominions were intended to fall within the provisions of the statute.

It was said, however, for the Defendants, that the same word "author" which is contained in this statute was also contained in the statute of *Anne*, the first copyright statute, and that strong opinions were expressed by the judges and by the Law Lords in the *House of Lords*, in the case of *Jefferys* v. *Boosey*, that the word "author," in the statute of *Anne*, meant an author resident in *England* at the time of publication, and that the same construction ought to be given to the word "author," in the statute 5 & 6 Vict. cap. 45, now under our consideration. But there is no provision in the statute of *Anne*, that the statute shall extend to the colonies, and in the statute we are now considering it is expressly so provided.

Several other arguments were also urged on the part of the Defendants. It was first said that the statute now in question does not extend to colonies, like *Canada*, having legislatures of their own. I have not, however, any doubt whatever on this point; the word colonies in the statute must extend to all colonies in the absence of a context to control it; and I can find no such context.

A more plausible argument on the part of the Defendants was this: It was said, and I assume for the purposes of the argument, but for that purpose only, that by a Canadian statute an alien coming into *Canada* for the purpose of publishing a work, and publishing it there, would not be entitled to copyright in the work so published; and it was insisted that an alien coming into *Canada*

could acquire only such rights as are given by the law of *Canada*, and could not, therefore, be entitled to copyright; and some cases were cited in support of this argument. On examining these cases, however, they will be found to decide no more than this:—that as to aliens coming within the British colonies their civil rights within the colonies depend upon the colonial laws; they decide nothing as to the civil rights of aliens beyond the limits of the colonies. This argument, on the part of the Defendants is, in truth, founded on a confusion between the rights of an alien as a subject of the colony, and his rights as a subject of the Crown. Every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws; for the laws of a colony cannot extend beyond its territorial limits. Now, in this case, the question is not what were, or are, the rights of the Plaintiffs within the colony of *Canada*, but what were, or are, their rights in this country; and the law of this country leaves no doubt upon that question. By the 25th section of this statute it is enacted, that all copyright shall be deemed to be personal property; and in *Calvin's* case (1) it was decided that an alien friend may, by the common law, have, acquire, and get within this realm by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as an Englishman, and may maintain any action for the same. That case, I think, is in all respects applicable to the case before us; and I agree, therefore, in the opinion of the Vice-Chancellor, and think that the motion to dissolve this injunction must be refused with costs; and that there must be a decree according to the prayer of the bill, with costs to be paid by the Defendants.

SIR J. L. KNIGHT BRUCE, L.J.:—I am of the same opinion.

(1) 7 Rep. 1.

L. JJ.
1865
Nov. 10, 11, 13, 25.

TAYLOR *v.* MANNERS.

Debtor and Creditor—Release—Security, Giving up—Consideration.

The residuary estate of a testatrix consisted in part of a debt secured by a policy of assurance on the life of the debtor. The residuary legatees gave up the policy to the debtor, and signified their intention of releasing the debt on condition of his paying the probate and legacy duty on the debt:—

Held (*dubitante* KNIGHT BRUCE, L.J.), that the payment of the probate and legacy duty formed a good consideration for the release of the debt, and that the debt was released.

Per TURNER, L.J.—*Semble*, that although the giving up of a security is not in itself a release of the debt, yet when it is given up with a clearly expressed intention of releasing the debt, it may amount to a release even at law.

Per TURNER, L.J.—*Semble*, also, that notwithstanding the rule that where there is no release of a debt at law, there is none in equity, yet there may be considerations which would prevent the debt from being enforced in equity, although subsisting at law.

THE question for the decision of the Court in this case arose out of a claim by the executors of Mrs. *Harriet Thackrah*, to prove against the estate of *Arthur Manners*, the testator in the cause, for two sums of £3400 and £3756, and interest.

The circumstances were as follows:—The testator who was the son-in-law of Mrs. *Thackrah*, was indebted to the husband of that lady, at the time of his death, in the sum of £3756. Mrs. *Thackrah* was the executrix of her husband, and after his death the testator became indebted to her in a further sum of £3400. On the 24th of October, 1855, the following agreement was entered into between the testator and Mrs. *Thackrah*:—

"MEMORANDUM that it is agreed between us, the undersigned *Arthur Manners* and *Harriet Thackrah*, as follows:—The sum of £3400, part of the debt due from Mr. *Manners* to Mrs. *Thackrah*, shall bear interest at the rate of 3½ per cent. per annum, to be payable half-yearly, and such principal sum of £3400 shall be payable only on the first of the following events happening, namely:—1st. On the decease of Mr. *Manners*. 2nd. On his present interest in the brewery, now carried on by him in partnership with Mr. *Wells*, being sold or disposed of by Mr. *Manners*, or

the same ceasing to be carried on by him. 3rd. In case of the decease of Mrs. *Thackrah*, then, after seven years from her decease, such principal sum of £3400 shall be payable by yearly instalments of £500 each. The above agreement for deferring the payment of the principal of such £3400, is only to be in force provided Mr. *Manners* shall, whenever required by Mrs. *Thackrah* or her executors or administrators, give to her or them a new acknowledgment for such part thereof as may be unpaid, and at the like rate of interest. The sum of £3756, which is agreed to be the remainder of the debt due from Mr. *Manners* to Mrs. *Thackrah*, shall be subject to the like terms and conditions, in all respects subject, as after mentioned; but the first instalment on the principal of such £3756, on the third event above mentioned, shall not be payable till after the last instalment of the said sum of £3400; such sum of £3756, and the interest thereon, shall be a charge on Mr. *Manners'* share and interest aforesaid in the said brewery business, and be payable only out of the profits or produce thereof; and Mr. *Manners* shall not be further liable in respect of such £3756, or the interest thereof. A certain policy of assurance, No. 6627, dated 17th of May, 1850, granted by the *Union Life Assurance Company* for £4000, payable on the decease of Mr. *Manners* and now deposited by him with Mrs. *Thackrah*, shall be held by her for securing, out of the money to be receivable thereon, the payment of said debt and interest as aforesaid."

The policy, mentioned in the agreement, was deposited with Mrs. *Thackrah*, and notice of the deposit of the policy was duly given to the office in which the policy was effected.

Mrs. *Thackrah* died on the 10th of November, 1862, having, by her will, appointed *Thomas Burgoyne* and *Michael Rimington* to be her executors, and having bequeathed the residue of her estate to her five daughters. The five daughters of Mrs. *Thackrah*, on the 3rd of January, 1863, addressed to Mr. *Burgoyne*, who was the acting executor of Mrs. *Thackrah*, the following letter:—

"In one of your letters you mention a deed executed between our mother and Mr. *Manners*. As we have all agreed that we do not wish it acted on, will you kindly return us the

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deed, that we may give it back to Mr. *Manners?* As it only concerns ourselves, there can be no objection to this. If there is any reference to the matter in our mother's will, we will ourselves write to Mr. *Rimington* to state our decision."

Miss *Elizabeth Thackrah,* the eldest daughter, in her affidavit, stated that, by the "deed" in this letter was meant the policy of assurance; and that the intention of herself and her sisters was to give the money secured thereby, but not a release of the debt, in order that the testator might settle it on his children."

This letter was, on the day on which it was written, shewn by the daughters to the testator, but nothing appears at this time to have been done in pursuance of the letter. Notwithstanding the intention expressed in the letter, the agreement remained in the hands of Mr. *Burgoyne,* Mr. *Thackrah's* executor, and the policy, which appears at this time to have been in the hands of the testator (having been returned to him in April, 1856, with a view to some arrangement respecting a bonus which then became payable upon it) was left in his hands.

Shortly after the date of this letter, a valuation of Mrs. *Thackrah's* estate was made, for the purpose of her will being proved. Upon this occasion there was a meeting between the testator and the executors of Mrs. *Thackrah.* At this meeting the testator stated that he was unable to pay the full amount of the debt which was due from him, and £5000 was agreed to be taken as the estimated value of the debt, including the value of the policy. The executors of Mrs. *Thackrah* then proved her will, paying probate duty upon her estate as being above £20,000, including the £5000, the estimated value of the debt. Independently of this £5000, the probate duty would have been payable upon her estate, as being of the value of between £17,000 and £18,000 only, and the excess of probate duty consequent on the £5000 being included in the estate, amounted to £70. In addition to this excess of probate duty, the five daughters of Mrs. *Thackrah* would be chargeable with £50 for legacy duty, at £1 per cent. on the £5000, the estimated value of the debt.

Soon after the will of Mrs. *Thackrah* had been proved, the testator applied to her executors to withdraw the notice of claim

upon the policy which had been given to the insurance office, as above mentioned, and thereupon Mr. *Burgoyne*, on the 7th of March, 1863, wrote to *Elizabeth Thackrah*, who principally acted in the matter on behalf of herself and her sisters, the following letter:—

"Having now fully considered the matter as to Mr. *Manners*' debt, I think it necessary to have the inclosed more formal authority signed by you and your sisters, before the executors act on your wishes; for we cannot well deliver up the instrument of security itself until we have settled the legacy duty on the value of the debt and its security, and Mr. *Manners*, whose solicitors, Messrs. *Marson and Dadley*, I have seen on the matter, is rather pressing to have the policy released by the executors. I settled with Mr. *Manners* and Mr. *Rimington* that we must consider the present value of the debt and securities as at least £5000, which will give the amount of £50 or more payable thereon as legacy duty, at one per cent., and it has increased the probate duty the executors have had to pay from £280 to £350, being a difference of £70 more."

Enclosed in this letter was the following formal authority:—

"To *Thomas Burgoyne*, Esq., and *Michael Rimington*, Esq., executors of Mrs. *Harriet Thackrah*, deceased. We, the undersigned, being the daughters and residuary legatees named in the will of our said late dear mother, hereby authorize and request you to release and discharge *Arthur Manners*, Esq., from all debts and securities whatever, due from or by him to her. Dated this 7th of March, 1863."

This formal authority was signed by Miss *Thackrah* and by the four other daughters, and on the 9th of March, 1863, was returned by Miss *Thackrah* to Mr. *Burgoyne*, enclosed in the following letter:—

"We have sent you the paper signed. We think, as Mr. *Manners* virtually succeeds to the money, he should pay his proportion of the probate duty. Will you explain this to Mr. *Marson*?"

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In consequence of this letter, on the 11th of March, 1863, Mr. *Burgoyne* sent the following letter to Mr. *Manners'* solicitors, viz.:—

"We are ready to hand you over the written notice, signed by the executors, on receiving our charges, and subject to the following paragraph in a letter from Miss *Thackrah* being disposed of, viz.:—'We think, as Mr. *Manners* virtually succeeds to the money, he should pay his proportion of the probate (and legacy, we believe is meant) duty. Will you explain this to Mr. *Marson?*' Mr. *Manners*, in an interview here lately with the executors, said he thought he should pay such duty, and arranged the executors should, for that purpose, propose to the *Legacy Duty Office* to put the value of his debt at £5000. The proportion of probate duty is £70, as raising the estate above £20,000 and under £25,000, instead of under £18,000 and the legacy duty would be £50 more."

The testator then paid to Messrs. *Burgoyne & Company* the sum of £122 2*s.*, being £70 for the excess of probate duty, and £50 for legacy duty, and £2 2*s.* for Messrs. *Burgoyne's* charges, and thereupon the notice to the insurance office was withdrawn. Upon the payment of the £122 2*s.*, the following receipt was given by Messrs. *Burgoyne* to the solicitors of the testator:—

"1863. March 31st. Estate of Mrs. *Harriet Thackrah.* Received of Messrs. *Marson, Dadley, & Marson, & Company,* the sum of £120, being Mr. *Manners'* proportion of probate and legacy duty herein, and also £2 2*s.* the amount of our charges on Mr. *Manners* relating thereto.

The testator died on the 18th of May, 1863, and the present suit was instituted by creditors for the administration of his estate.

Vice-Chancellor *Stuart*, before whom the cause was heard, held that the whole of the debt had been released, and that the executors of Mrs. *Thackrah* were not entitled to prove for any part of it against the testator's estate.

From this decision the executors appealed. When the appeal came on before the Lords Justices, their Lordships directed the claim to be amended, by adding the names of the daughters and

residuary legatees of Mrs. *Thackrah*. This was accordingly done and those ladies now joined with the executors in the appeal.

Mr. *Bacon*, Q.C., and Mr. *Hardy*, for the appellants :—

The residuary legatees desire to claim only the difference between the original debt and the sum covered by the policy. But on behalf of the executors, who are responsible for the assets, we contend that no part of the debt has been released. The residuary legatees acted on imperfect information as to the circumstances. They only intended to give up the amount covered by the policy, in order that it might be settled on the testator's children. But that intention was never carried into effect. The giving up of the policy was no release of the debt at law; and where there is no release at law declarations of intentions will not constitute a release in equity. *Cross* v. *Sprigg* (1). *Peace* v. *Hains* (2).

Here there was no consideration for the release. The payment of probate and legacy duty was only in the nature of part payment of the debt, which can be no release of the remainder.

Mr. *Malins*, Q.C., and Mr. *Swanston*, for the Plaintiffs; and Mr. *Osborne*, Q.C., and Mr. *Haynes*, for the executors of Mr. *Manners*:—

We admit that a mere intention to release a debt is not effectual, but here there was what amounted to a release, and the legatees cannot now revoke it. They gave up the security with an intention of forgiving the debt, and instructed the executors formally to release it. *Richards* v. *Symes* (3). *Major* v. *Major* (4). *Flower* v. *Marten* (5). *Wekett* v. *Raby* (6). *Kekewich* v. *Manning* (7). The payment of the probate and legacy duty was not a part payment of the debt, but was a payment forming a good consideration for the release of the debt. *Cheale* v. *Kenward* (8). *Norton* v. *Wood* (9).

Mr. *Bacon*, in reply.

(1) 6 Hare, 552.
(2) 11 Hare, 151.
(3) 2 Eq. Ca. Ab. 617.
(4) 1 Drew. 165.
(5) 2 My. & Cr. 459.
(6) 2 Bro. P. C. 386.
(7) 1 De G. M. & G. 176.
(8) 3 De G. & J. 27.
(9) 1 Russ. & My. 176.

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Nov. 25. SIR G. J. TURNER, L.J., after stating the facts of the case, and referring to the agreement and letters stated above, continued:—

It is under these circumstances that the Vice-Chancellor has held that the executors of Mrs. *Thackrah* are not entitled to prove these debts against the estate of the testator, and I agree in his Honour's opinion. The only questions which, in my opinion, it is material for us to consider in this case are, First, what was the nature of the transaction between these parties. Was it a transaction of gift, pure and simple, or of agreement for valuable consideration? and, Secondly, assuming it to have been a transaction of agreement for valuable consideration, what was the subject of the agreement?

It will be convenient first to deal with the second of these questions. It was strongly argued on the part of the appellants that the transaction between these parties had reference to the policy only; that what the parties had in contemplation was the relinquishment of the policy as a security for the debt, and not the relinquishment of the debt itself, or of any part of it; but I am not of that opinion. Some parts of the communications between these parties taken by themselves would, no doubt, tend to the conclusion that the policy only was the subject of consideration between them, but looking not to detached parts of the communications but to the whole of them, I am satisfied that they had reference to the debt no less than to the policy. The letters of Miss *Thackrah* to Mr. *Burgoyne* of the 9th of March, and of Mr. *Burgoyne* to the solicitors of the testator of the 11th of March, seem to me to put this point beyond all doubt. The expression used in these letters is, "As he (that is, Mr. *Manners*) virtually succeeds to the money," and it is clear that the money here referred to was not the money payable upon the policy, but was the whole debt; for the letters had reference to the payment of the probate and legacy duty, not on the value of the policy only, but on the £5000, at which the whole debt had been estimated. It has not, of course, escaped my attention that one of these ladies, in an affidavit filed by her in support of the appellant's claim, has stated that in the letter of the 3rd of January, 1863, she and her sisters, in referring to the deed between their mother and the testator, meant to refer to the policy for £4000,

but I think it very doubtful whether any evidence can be received to explain the terms used in this letter—whether the expression "the deed," used in the letter does not so pointedly refer to the agreement of the 24th of October, 1855, as to preclude the admissibility of any such evidence. Assuming, however, the evidence to be admissible, I think that no weight can be given to it. The policy cannot, I think, have been intended to be referred to as a deed between Mrs. *Thackrah* and the testator, nor can it have been what these ladies "desired not to be acted on," which is another of the expressions contained in the letter. On this second point, therefore, my opinion is, that the transaction between these parties had reference to the whole debt, and not, as contended for by the appellants, to the policy only.

I proceed then to consider the first question, whether the transaction between these parties was one of pure and simple gift, or of agreement for valuable consideration. That the transaction in its inception was one of pure and simple gift merely does not, I think, admit of any doubt. It was plainly so in January, 1863. Upon the case, as it then stood, there was no more than an intention to give, communicated, indeed, to the testator, but in no way carried into effect. At law there was certainly no perfect gift, and a court of equity as certainly will not enforce a mere intention to give. If, therefore, the case had rested here, I feel no doubt that the appellants would have been entitled to our judgment in their favour upon this appeal, but the transaction, as it seems to me, changed its character in March, 1863. I think that what then passed amounted to a proposal by the executors of Mrs. *Thackrah*, under the direction of the five daughters to the testator, that he should be considered as succeeding to the money, meaning, as I have before shewn, the whole debt, upon the terms of his paying the probate and legacy duty upon the £5000, at which the debt was valued, and to an acceptance by the testator of that proposal, and payment made by him upon the faith of it. Both the letters of the 7th, 9th, and 11th of March, and the receipt given by Messrs. *Burgoyne* to the solicitors of the testator, confirm this view. Here, therefore, we find the testator paying the probate and legacy duty at the instance of the executors and daughters of Mrs. *Thackrah*, on the faith of his

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being entitled to the debt, and I can see no distinction between his paying this consideration and his having given any other consideration for the same purpose. It was a bargain between the parties, and it is clear from the evidence that what was done was fully understood and intended on both sides. The executors and daughters of Mrs. *Thackrah* have, therefore, no equity to be relieved from it; and, I think, that having entered into this arrangement, and received the consideration, they cannot now be entitled to claim the debt from the testator's estate.

It was attempted on their part to meet this view of the case by alleging that what took place at the time we are now considering had reference only to the withdrawal of the notice to the insurance office, and, therefore, affected only the policy as a security for the debt, and not the debt itself; but I think that this argument cannot be maintained. It is true that the withdrawal of the notice as to the policy was the subject then immediately under consideration, but the letters and receipt shew that the ground on which the notice was to be withdrawn was that the testator succeeded to the money, meaning, as I have already more than once said, the whole of the money which was due from him.

Much was said in the course of the argument before us upon other points; upon the one side, that there could be no release of the debt in equity unless there was a release of it at law; and on the other side, that there was in this case a perfect release of the debt by the policy having been given up. But I do not think it necessary to enter into these points, and I give no opinion upon them. It may be right, however, for me to say that I am not satisfied that where the intention is clear to release a debt, and a security is given up, which covers the whole debt, as I think, upon the true construction of the agreement, the policy in this case did, the debt would not be released at law; nor, assuming that there can be no release of a debt in equity unless it be released at law, am I satisfied that there may not be considerations which would in this Court prevent the debt from being enforced, although it might be subsisting at law.

Some attempt was made on the part of the appellants to support their case upon the ground that what passed as to the relinquishment of the debt proceeded upon the footing of an agree-

ment by the testator to settle it upon his children, but I think that the evidence fails to prove any such agreement, and upon the ground which I have stated, I am of opinion that the order of the Vice-Chancellor in this case is correct, and that this appeal must be dismissed; but from the difficulty in the case I think it should be dismissed without costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

I have not ceased to consider this case with great and unusual anxiety. The first question is, whether the transaction is, from its nature, capable of being supported without valuable consideration; and I am not satisfied that from its nature it is capable of being supported without valuable consideration.

The next question is, whether there was valuable consideration; and looking, on the one hand, at the total amount of debt due to the appellants, and on the other, to the smaller amount of the two sums which were paid by the debtor for the probate and legacy duty, I am not satisfied that there was valuable consideration. Whether the payment, in fact, amounted to anything more than a payment by a debtor to his creditor of a less amount than the sum due, or whether it was such a transaction as is capable of being supported on the ground of contract, I am not satisfied. Although the two small sums were paid for legacy and probate duty, and were not paid directly to the debtor, I am not satisfied that such payment stands on a better footing than a payment of a less sum by a debtor to a creditor instead of the whole amount.

I doubt, therefore, as to the proper order to be made; but the agreement of my learned brother with the Vice-Chancellor, disposes of the case. It is satisfactory to me that my learned brother thinks that the appeal should be dismissed without costs.

L. JJ.
1865
Nov. 6, 7.

COCHRANE *v.* WILLIS.

Agreement—Consideration, want of—Mistake.

A tenant in tail, expectant on the death of a tenant for life who was insolvent, being desirous of preserving the timber on the estate from being cut signed an agreement with the agent of the assignee of the tenant for life, agreeing that the assignee should have the same right to the timber as if he had actually cut it, on a past day named, which was prior to the death of the tenant for life; and the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although both the tenant in tail and the agent of the assignee were ignorant of the fact:—

Held, that the agreement was founded on a mistake, and was without consideration, and the court refused to enforce it.

THIS was an appeal from the decision of the Master of the Rolls.

In June, 1863, *Joseph Willis*, who was a merchant at *Calcutta*, became insolvent, and, by an order of the Insolvent Court at *Calcutta*, dated the 17th of that month, all his property, real and personal, became vested in the Plaintiff, *John Cochrane*, the official assignee.

At the time of his insolvency, *Joseph Willis* was tenant for life, without impeachment of waste, of an estate consisting of a mansion house called *Halsnead Hall*, and certain freehold lands in the county of *Lancaster*, with remainder to his first and other sons in tail male, with remainder to his brother, the Defendant, *Daniel Willis*, for life, with remainder to the Defendant, *Henry Rodolph Willis*, his eldest son, in tail male, with remainder over. The house and park, which contained a considerable quantity of timber, were kept in hand and farmed by *Daniel Willis*, who acted as the agent of his brother, and managed his property in *England*.

On the 6th of August, 1863, Messrs. *Graham & Lyde*, solicitors, of *London*, received a letter from the Plaintiff appointing them his attorneys to do all necessary acts in the insolvency of *Joseph Willis*, and instructing them immediately to take possession of and realize the insolvent's property in *England*.

On the same day Messrs. *Graham & Lyde* wrote to *Daniel Willis*, who was residing at *Liverpool*, informing him of the instructions they had received, and requesting him to furnish them with

information as to the property of his brother. They subsequently wrote other letters to *Daniel Willis* and his solicitors, Messrs. *Lawrance, Plews, & Bowyer*, complaining of the delay in sending the information required, and ultimately threatened legal proceedings; but no information was furnished them until the 22nd of October, when *Daniel Willis* sent them a paper purporting to be a report of the property of the insolvent.

Messrs. *Graham & Lyde* considered that the delay had been purposely interposed by *Daniel Willis*, and that the information, which was at length furnished them, was unsatisfactory and insufficient; and Mr. *Lyde*, accompanied by one of his clerks, forthwith went down to *Halsnead*, and, on the 28th of October, took possession of the house and adjacent property in the name of the official assignee. On the 30th of October a meeting took place between Mr. *Lyde*, *Daniel Willis*, and his eldest son, *Henry Rodolph Willis*, at which *J. W. Farrar*, a nephew of *Daniel Willis*, was also present as their legal adviser, and Mr. *Lyde* again complained of the delay in furnishing information, which, as he represented, had prejudiced the creditors of the insolvent. He stated that he had a right to cut all the timber on the estate, which he threatened to do at once, unless the Defendants would execute an agreement which he had prepared, in order that the assignee might be put in the same position as if he had been able to take possession when the information was first applied for. Accordingly the parties executed an agreement of that date, which was as follows:—

"MEMORANDUM OF AGREEMENT made and entered into between *Daniel Willis*, &c., and *Henry Rodolph Willis*, &c., of the one part, and *John Cochrane*, Esq., of *Calcutta*, Barrister-at-Law, Official Assignee of the Court for the Relief of Insolvent Debtors at *Calcutta*, of the other part. Whereas, *Joseph Willis* has been adjudged an insolvent by the said Court. And whereas the said *Daniel Willis* was agent in *England* of the said *Joseph Willis*, and heard of such insolvency on or about the 6th day of August last. And whereas, Messrs. *Graham & Lyde*, the agents in *England* of the said *John Cochrane*, at once applied to the said *Daniel Willis* for a statement of the assets of the said *Joseph Willis*, and to be

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put in possession of such information as would enable them to act, which the said *Daniel Willis* has until within the last few days delayed to do. And whereas, the said Messrs. *Graham & Lyde* have called upon the said *Daniel Willis* forthwith to put them, as representing the said *John Cochrane*, in the position, so far as represents the assets of the said *Joseph Willis*, they would or might have been in if the said *Daniel Willis* had, on their application in August last, at once put them in possession of such estate and effects. And whereas, the said *Daniel Willis* and *Henry Rodolph Willis* are respectively interested in reversion in all or a portion of the real and leasehold hereditaments and premises situate in the parishes of *Prescott*, and *Huxton*, and *Bolton-le-Moors*, or one or more of the townships thereof respectively, or elsewhere, lately in the possession of the said *Daniel Willis*, as such agent as aforesaid. And whereas, in particular the said Messrs. *Graham & Lyde* have called upon the said *Daniel* and *Rodolph Willis* to put them in such position as aforesaid as regards the timber and timberlike trees, and other trees, plantations, and underwood, in and upon the said hereditaments and premises, and as regards all fixtures and quasi-fixtures, articles, and things, in or about the same which, as representing the said official assignee, and through him the said *Joseph Willis*, they were entitled to fell, cut down, root up, or move and carry away on the 15th day of August last, and threaten, if the said *Daniel Willis* and *Henry Rodolph Willis* decline to enter into such engagement forthwith, to fell, cut down, root up, and move, and carry away the same, so far as they legally can or may. And whereas, the said *Daniel Willis* and *Henry Rodolph Willis*, being very desirous to avert if possible such a course, which would irreparably injure the said hereditaments and premises, have offered and agreed to enter into the agreement and arrangement hereafter contained. Now it is mutually agreed by and between the said *Daniel Willis* and *Henry Rodolph Willis*, and each of them apart from the other, on the one part, and the said *John Cochrane* on the other part, as follows:—

1st. That the said *John Cochrane*, as such assignee as aforesaid, shall be and be deemed and taken as entitled to the said timberlike trees and other trees, plantations, and underwood in or upon the said hereditaments and premises, and the said fixtures and

quasi-fixtures, articles, and things, in or about the same, as if the same had been respectively felled, cut down, rooted up, removed, and carried away by him on the 15th day of August last. 2nd. That the said *Daniel Willis* and *Henry Rodolph Willis*, to the extent of and according to their respective interests in the said hereditaments and premises, present or future, will carry out this agreement. 3rd. That nothing herein contained shall be construed as giving the said *John Cochrane* any right, title, and interest besides what he had or could have exercised on the said 15th day of August, or since. 4th. That the said *John Cochrane* shall not fell, cut down, root up, or move, or carry away any timber, fixtures, or quasi-fixtures in or about the said hereditaments before the 1st of December next."

Joseph Willis was dead at the time of the execution of this agreement, although the fact was not known to any of the parties. He died on the 24th of September, being of the age of 74 years, and unmarried. His death was known to the Plaintiff at *Calcutta* on the following day, but the news did not reach Messrs. *Graham & Lyde*, or the Defendants, till early in the month of November.

The Defendants subsequently repudiated the agreement, and the present bill was filed, praying for a declaration that the timber and the fixtures in the mansion house ought to be in equity considered as if they had been felled for the benefit of the creditors of the insolvent, on the 15th of August, 1863, and for consequential relief.

The Master of the Rolls dismissed the bill with costs, and from this decision the Plaintiff appealed.

Mr. *Baggallay*, Q.C., and Mr. *Swanston*, for the Plaintiff :—

There was no fraud or mistake in making the agreement of October, 1863. All parties knew that *Joseph Willis's* life was uncertain, and that it was doubtful whether he was then alive. The date of the 15th of August was fixed on as a date when he was known to be alive. The agents of the Plaintiff had been unwilling to press for possession of the estate, and they had been

(1) See 34 Beav. 359.

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deluded by *Daniel Willis*, who had promised them information, which he had delayed to give. The agreement was a family arrangement which the Court would support.

Mr. *Selwyn*, Q.C., Mr. *Hobhouse*, Q.C., and Mr. *Lawrance*, for the Defendants.

Daniel Willis had been guilty of no fault. He had given the information which was required; but it was not his duty to facilitate the Plaintiff in taking possession. There was no consideration for the agreement. It was an oppressive bargain which this Court will not enforce. *Day* v. *Newman* (1), *Wedgwood* v. *Adams* (2), *Falcke* v. *Gray* (3). The agreement was based on mistake, and when the mistake was discovered the whole foundation of it was swept away. The Defendants were in fact dealing with their own property, not knowing it was theirs. *Bingham* v. *Bingham* (4), *McCarthy* v. *Decaix* (5), *Harnett* v. *Yeilding* (6). The Plaintiff being at *Calcutta* knew that *Joseph Willis* was dead, and he cannot take advantage of his agent's ignorance of what he knew himself.

Mr. *Baggallay*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

It is obvious that the question of the continuing life of *Joseph Willis* at the date of the agreement (the 30th October) was a most material question. It is plain that if the Defendants entered into the agreement with the understanding and under the belief, whether prudently or imprudently entertained, that *Joseph Willis* was alive, and if they have a right to allege that understanding as against *Cochrane*, then, without doubt, there has been a misapprehension and a mistake as to what is a most material fact. The mere circumstance that *Joseph Willis* was absent, far away, and that it could not be certainly known whether he was alive or dead, and therefore that a degree of uncertainty was

(1) 2 Cox, 77.
(2) 6 Beav. 600.
(3) 4 Drew 651; 3 Jur. N.S. 642
(4) 1 Ves. sen. 126.
(5) 2 R. & M. 614.
(6) 2 Sch. & Lef. 749.

unavoidable does not appear to me important. The Plaintiff entered into the agreement on the supposition that the life was continued.

It is, however, argued that this was not the case, and that the words of the agreement, particularly the words "interest, present or future," and the collateral evidence, show that the agreement was to take effect and the timber to be paid for, whether in point of fact the estate was the estate of the Defendants or not. It appears to me, however, that this is not the effect of the words "present or future," or of the evidence. As both the contents of the documents and the accompanying evidence stand, it must be taken to have been assumed on the part of *Graham & Lyde* and the Defendants that *Joseph Willis* was alive at the time. That *Cochrane* knew him to be dead I assume to be immaterial, as I am not sure that it ought to be taken into account, as his agents in *England*, whether wisely or unwisely, were acting under the belief that *Joseph Willis* was alive. This was assumed by all parties; but it appears that in reality *Joseph Willis* had been dead more than a month, and therefore there was substantially an absence of consideration and substantially a mistake; and it would be contrary to all the rules of Equity and Common Law to give effect to such an agreement, or to hold that a person ought to be bound by it. The Master of the Rolls was right, and the bill must be dismissed with costs.

SIR G. J. TURNER, L.J.:—

I entirely agree with the Master of the Rolls, and with all that has fallen from my learned brother as to what was intended by the parties to the agreement. It was entered into on the assumption that *Joseph Willis* was alive, and was only intended to take effect on that assumption. Mr. *Baggallay* laid great stress on the fact of the 15th of August being mentioned, and asked for what reason it was inserted in the agreement, if it were not for the reason that it was uncertain whether *Joseph Willis* was alive subsequently to that date. It is impossible to say for certain why that date was introduced, but the evidence tends to show that it was introduced on the supposition that nine days would have been a sufficient interval for *Daniel Willis* to have given the required

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information, and it was wished to fix some time at which the state of the property might have been ascertained.

I think there is a further reason for not giving effect to this agreement. As *Joseph Willis* died on the 24th of September, beyond all doubt the timber was the property of *Daniel Willis*, as tenant for life of the estate. But what is the effect of the agreement? It is that the timber which was really the property of *Daniel Willis* was to become the property of *Joseph Willis* or his assignee. What was the consideration for this? That the assignee, who had no right to the timber, should not proceed to cut it till the 1st of December. I see no other consideration, and I have no idea that the Court will enforce such an agreement, by which a man, not knowing his rights, gives up property for no other consideration than that a person who in the result had no right to it, should agree not to exercise rights which he assumed that he had. The case of *Bingham* v. *Bingham* bears so strongly on this case, and the hardship is such, that the Court will not enforce the agreement, but will leave the parties to any remedy which they may have at law. The bill was properly dismissed, and the appeal must be dismissed with costs.

L. JJ. 1865. *Nov.* 7.

JOHN *v.* LLOYD.

Practice—Amendment of Bill—Reprint.

Although the amendments in a bill do not exceed in any one place two folios, the Clerk of Records and Writs has a discretion to refuse to file it without reprint, if the amendments are numerous and complicated.

IN this case the Clerk of Records and Writs had declined to file an amended bill on the ground that the amendments were of such a nature that the bill ought to be reprinted. Application had been made to Vice-Chancellor *Stuart*, who agreed with the Clerk of Records and Writs, and refused the application.

It appeared that the bill was amended to a considerable extent in various places, but in no one place did the amendment exceed two folios of ninety words each.

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The Consolidated Order ix., rule 18, directs that where an amendment of a bill might formerly have been made without a new ingrossment thereof, a bill may be amended by written alterations in the printed bill which has been filed, and by additions on paper to be interleaved therewith, if necessary. But where such amendment could not formerly have been made without a new ingrossment, it shall be made by a reprint of the bill.

By the former practice a new ingrossment was not considered necessary if no amendment extended to more than two folios of ninety words each, in one place (1).

Mr. *Everitt* applied for a direction that the bill should be filed, and referred to *Stone* v. *Davies* (2), by which it was decided that the rule requiring a new print of the bill, if any amendment exceeded two folios, was compulsory. He contended that in like manner the Clerk of Records and Writs had no discretion to refuse to file a bill if no amendment exceeded that length.

The LORD JUSTICE TURNER, having looked at the amended bill, said that the amendments were numerous and complicated, and rendered the bill extremely difficult to read in its present state. It would be an inconvenient precedent to require such a bill to be filed without a fresh print. He thought there must be some discretion in the Clerk of Records in Writs.

The LORD JUSTICE KNIGHT BRUCE concurred, and the application was refused.

(1) The regulation that folios are to be reckoned at seventy-two words each (Consol. Regulations as to Fees and Charges iv., rule 4) is not applied to this subject.

(2) 3 D. M. & G. 240: 17 Jur. 586.

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1865
Nov. 16.

3 Eq 202
5 Eq 169.
4 Ch 78
Eq 384.
Eq 638, 640

TIPPING *v.* ST. HELEN'S SMELTING COMPANY.

H. sold land to persons who were described in the conveyance as copper-smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. *H.* subsequently sold neighbouring land to the Plaintiff, who bought with full notice of the existence of the copper-works. The Plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. V.C. *Wood* held that the Plaintiff's having come to the nuisance did not disentitle him to equitable relief, and that *H.*'s having sold the site of the works with full knowledge that such works would be erected on it did not disentitle him or those claiming under him to complain of any nuisance which the works might occasion, and his Honour granted an interlocutory injunction:—

Held, on appeal, that the injunction had been rightly granted.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Wood*, granting an interlocutory injunction to restrain the Defendants from injuring the Plaintiff's land by the smoke from their works.

In August, 1859, part of the estate of Sir *Henry de Hoghton*, near *St. Helen's*, was put up for sale in lots. A Mr. *Critchley* bought at the sale one of the lots, being the land on which the Defendant's works were afterwards erected. He bought it for the purpose of copper-works, obtained immediate possession, and immediately commenced erecting copper-works, which were nearly completed before the 14th of March, 1860, on which day the purchase was completed. The conveyance was made to Lord *Alfred Paget*, Mr. *Critchley*, and another, described therein as co-partners and copper-smelters, and it was recited that the purchase had been made on behalf of the partners and for the purposes of the partnership.

In July, 1860, Sir *Henry de Hoghton* put up for sale other parts of his property, including *Bold Hall* and the park belonging to it. The Plaintiff became the purchaser. It was admitted by the

Plaintiff, that when he entered into the contract he had seen a large chimney which formed part of the works now belonging to the Defendants and was aware that it belonged to copper-works.

It was in evidence that there were already many chemical works in the neighbourhood of *St. Helens*, emitting a large quantity of deleterious vapour, but it did not clearly appear that the Plaintiff's property had ever sustained any appreciable injury from them.

In 1861 a company was projected for the purpose of carrying on the copper-works above mentioned. The Plaintiff had already perceived that injury was done to his trees by the smoke, and understanding that the company would carry on the works on a larger scale, he entered into communication with the promoters. The company was incorporated in June, 1862, and after some correspondence—no arrangement being come to—the Plaintiff in July, 1863, commenced an action against the company. The company pleaded not guilty, and on the 27th of August, 1863, a verdict was found for the Plaintiff, with £360 damages. In November, 1863, an application for a new trial was refused by the Court of Queen's Bench. In November, 1864, this decision was affirmed by the Exchequer Chamber, and on the 5th of July, 1865, by the House of Lords.

The Plaintiff then on the 10th of July, 1865, filed his bill to restrain the Defendants from using their works so as to injure his estate, and for an account of damage since the time up to which damages had been obtained at law.

An injunction was moved for before Vice-Chancellor *Wood*. His Honour held that the fact of the Plaintiff having come to the nuisance, did not disentitle him to the aid of a Court of equity. As regarded the site of the works having been purchased from the same vendor for the purpose of erecting copper-works, and before the purchase by the Plaintiff, his Honour considered that the case was not the same as if the vendor had erected copper-works and sold them to the Defendants, and that his selling the land with the knowledge that the purchasers intended to erect copper-works upon it, did not debar him, or those claiming under him, from

11 Jur. N.S. 705; 11 H.L.C. 642.

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complaining of any nuisance that might arise therefrom to the other parts of his property. With respect to an allegation, supported to some extent by evidence, that the existence of the copper-works was mentioned during the negociations between the Plaintiff and Sir *Henry de Hoghton*, and produced an abatement in the price, his Honour considered that the existence of a nuisance, though liable to be suppressed by legal proceedings, was a fair ground for an abatement of price, and that it could not be inferred from the fact of such abatement having been made, that the purchasers had agreed to give up the right to complain of the nuisance. His Honour accordingly granted an injunction, which the Defendants now moved to discharge.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Giffard*, Q.C., and Mr. *Jackson*, for the Appellants:—

The persons through whom the Defendants claim, acquired the site of their works from Sir *H. de Hoghton*, for the purpose of copper-works, before the Plaintiff's purchase. If this is not a good defence at law, as being in substance a conveyance of the land with a grant of the right to use it for copper-works, we contend that, at all events, neither the vendor nor any person subsequently claiming under him with notice, could complain in equity of the carrying on of the works. We also say that the Plaintiff having voluntarily come to a nuisance, has no right to call upon a Court of equity to restrain it, but ought to be left to his legal rights and remedies. To this must be added, that the injury done by the Defendants' works is only a trifling addition to that done by the numerous works about *St. Helen's*. On the principles acted on in *Wood* v. *Sutcliffe* (1), and *Bankart* v. *Houghton* (2), the injunction ought to be refused. At all events, the Court will give us time, it being clearly proved that every effort has been made to adopt processes which will remove the nuisance, and that there is every prospect of their being successful.

Mr. *Rolt*, Q.C., and Mr. *Eddis*, for the Plaintiff, were not called upon.

(1) 2 Sim. (N.S.) 163. (2) 27 Beav. 425, 428; 5 Jur. N.S. 282

SIR J. L. KNIGHT BRUCE, L.J.:—

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A judgment at law has been obtained by the Plaintiff against the Defendants, for a nuisance affecting his real estate, and substantial damages have been given. It is almost of course, that in this state of circumstances, a Court of equity should grant an injunction to prevent the continuance of the nuisance, and I have heard no argument against it to which, consistently with the established rules, practice, and doctrine of this Court, any weight can be given. The cause has not been heard, and the Defendants will have an opportunity of urging at the hearing any reasons why the injunction should not be made perpetual; but as matters now stand, I think that the course taken by the Vice-Chancellor was clearly right, and that the appeal motion ought to be refused with costs.

SIR G. J. TURNER, L.J.:—I agree.

In Re BANK OF GIBRALTAR AND MALTA.

L. JJ.
1865
Nov. 3, 17.

Company—Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89, *s.* 165.)

A company being in course of voluntary winding-up, a Petition was presented, under the 165th section of the Companies Act, 1862, by some of the contributories, charging the directors with misapplication of moneys of the company, and praying a winding-up by the Court. The evidence being insufficient to establish the case of misapplication, but sufficient to lay ground for inquiry, the Court refused to direct an inquiry, but gave liberty to the Petitioners to file a bill in the name of the company against the directors, the Petitioners to indemnify the company against the costs.

Per TURNER, L.J.: *Semble*, that where a resolution for the voluntary winding-up of a company has been duly made, an order for winding-up by the Court cannot be made on the application of contributories.

Per TURNER, L.J.: Whether the 165th section of the Companies Act, 1862, applies under a voluntary winding-up *quære*. Where it does apply, the Court has a discretion as to whether the remedies given by it should be resorted to.

THIS was an appeal from an order of the Master of the Rolls dismissing with costs a Petition by the Appellants, who were four of the members and contributories of the company.

L. JJ.
1865
BANK OF GIBRALTAR AND MALTA.

The *Bank of Gibraltar and Malta, Limited*, was a company registered on the 4th of March, 1863, with a nominal capital of £250,000, divided into 2500 shares, of £100 each. The articles authorized the directors, as soon as the shares had all been subscribed for and allotted, and the deposit of £2 per share paid thereon, to pay to Mr. *Cookson*, the promoter of the company, the sum of £2000, and a further sum of £1000 after payment of the first call.

In March, 1863, directors were appointed. Applications were made for 2831 shares, and at a meeting on the 23rd of March, 1800 were allotted, the remaining 700 being reserved for allotment in Gibraltar and Malta. The Petitioners were allottees of 480 shares. The company never commenced business, no call was ever made, and the shares were not all allotted.

On the 10th of December, 1863, the directors came to an arrangement with *Cookson*, which was expressed as follows in the minute-book: "*Cookson's* claim compromised for £1000, in addition to payment of expenses and other liabilities and claims incurred in and about promotion, which said sum shall be considered for his services only." This transaction the Petitioners alleged to be a breach of trust on the ground that *Cookson* had no pretence of a claim for anything till all the shares had been allotted, and that there was therefore nothing to call into operation the power of compromise contained in the articles. In pursuance of this arrangement, the sums of £1000, £250, and £492 15*s.* were paid to *Cookson*.

The articles of association gave the directors power to accept the surrender and forfeiture of any shares on such terms as they thought fit. The directors accepted surrenders of shares from several shareholders, and returned their deposits in full.

On the 7th of January, 1865, a resolution was passed for a voluntary winding-up of the company, which was confirmed on the 1st of February. The winding-up was nearly complete when the Petitioners presented a Petition impeaching the above and other acts of the directors, and praying that the company might be wound up by the Court, and liquidators appointed; or, if the Court did not think fit to remove the liquidators appointed under the voluntary winding-up, then that the company might be wound up

under the supervision of the Court; and that *Cookson* and the directors might be ordered to account for and pay to the official liquidators, or to the present liquidators, all sums of money belonging to the company improperly received by or paid to them, or any of them respectively, with interest at £5 per cent., and that *Cookson* and the directors might be ordered to pay the costs of the application.

The Master of the Rolls dismissed the Petition, with costs.

Mr. *Jessel*, Q.C., and Mr. *C. A. Holmes*, for the Appellants:—

The order of the Master of the Rolls leaves us without any available remedy, and is, we submit, inconsistent with the Act. The object of all the legislation as to winding-up joint-stock companies is to take away the necessity of resorting to unmanageable suits like *Wallworth* v. *Holt* (1). We submit that the 165th section gives the Court a judicial authority, which must be exercised, and that we are entitled to a decision on the merits as a matter of right.

[The LORD JUSTICE TURNER observed that the words used were "the Court *may*."]

The word "may" is almost always used in a statute giving authority to a Court, and does not import an arbitrary discretion. Any difficulty as to facts can be met by directing inquiries; and a difficulty in law is not less on bill than on a summary proceeding. A bill in a case circumstanced like this would be very difficult to frame, and the suit would be unmanageable from the multitude of parties. At all events, the Petition ought not to have been dismissed, but ordered to stand over, with liberty to file a bill. We submit, however, that we are entitled to an immediate order on the directors to repay the sums misapplied, and for a compulsory winding-up, or a winding-up under the supervision of the Court.

Mr. *Southgate*, Q.C., and Mr. *Fischer*, for the directors:—

The remedy, if any, is by bill. The 165th section was never in-

(1) 4 M. & C. 635.

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tended to apply to any but clear breaches of trust, where there is no *bonâ fide* question to be tried. The Court has a discretion under that section in any case, and it is not clear that the section applies at all under a voluntary winding-up. It would be monstrous to direct a compulsory winding-up for the purpose of making that section applicable in a case so ill-suited to it. The case is eminently one for a bill such as in *Deeks* v. *Stanhope* (1); see *Carpenter and Weiss Case* (2), there being a *bonâ fide* question to try; for no act of the directors which is complained of was *ultra vires*, and their proceedings, unless they can be impeached for *mala fides*, are valid.

Mr. *Baggallay*, Q.C., and Mr. *J. Pearson*, for the liquidators.

Mr. *Jessel*, in reply:—

The Court will not put us to file a bill against thirty-five Defendants, when the Act provides a summary remedy.

Nov. 17. SIR G. J. TURNER, L.J.:—

There are three points raised by this appeal; first, whether this company ought to have been ordered to be wound up by the Court, secondly, whether it ought to have been ordered to be wound up under the supervision of the Court; and thirdly, whether any, and if any, what order ought to have been made on that part of the prayer of the Petition which seeks relief against the directors and officers of the company.

3 Ch. App. 21. It was stated on the part of the Appellants in the course of the argument before us that they did not desire an order that the company should be wound up by the Court if they could obtain an order that it should be wound up under the supervision of the Court, and the first point therefore which I propose to consider is, whether the Appellants are entitled to such last-mentioned order. Now the Act no doubt, by the 147th section, gives full power to the Court to make such an order, but it seems to me to leave

(1) 1 Sim. (N.S.) 439. (2) 5 De G. & Sm. 402.

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6 Ch 113,

it absolutely and entirely in the discretion of the Court whether the order shall be made or not. Neither in the section referred to, nor in any other part of the Act, so far as I have been able to find, has the Legislature in any way defined the circumstances by which the Court is to be guided in the exercise of this discretion. I think, therefore, that, in determining the question whether such an order should be made or not, we must look to the facts on which the application for the order is grounded, and consider whether those facts present a case rendering it proper that the order should be made with a view to putting in force some of the provisions of the Act, which would be available if the order were made, but would not be available under a mere voluntary winding-up. How, then, does this case stand when looked at from this point of view? The case brought forward by this Petition rests on the alleged breaches of trust and misconduct on the part of the directors; but these are matters which may be examined into and, if need be, corrected without any order for winding-up the company under the supervision of the Court. They can be reached, if not under the 165th, at all events under the 138th section of the Act. These charges, therefore, do not seem to me to furnish any ground for an order to wind up under supervision; nor do I find anything in the circumstances of this case which would render it necessary to put in force any of the provisions of the Act applicable to a winding-up under supervision, which would not be available in case of a voluntary winding-up. It is to be observed too that the Legislature clearly intended that the wishes of the contributories should be consulted, as appears by section 149; and in this case the voluntary winding-up is under a special resolution of the company; and it is not alleged that the majority of the contributories desire that it should be put under supervision. On the contrary, the evidence, so far as it goes, leads to the opposite conclusion. I am of opinion, therefore, that this Petition, so far as it seeks to have the company wound up under the supervision of the Court, was properly dismissed.

I think also that it was properly dismissed, so far as it seeks to have the company wound up by order of the Court. I very much doubt whether it was within the jurisdiction of the Court to make

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such an order upon the Petition of contributories. The 145th section seems to give the right to such an order to creditors only and, as it seems to me, not without reason, for the contributories must be bound by the resolution to wind up voluntarily, and it would be strange that any of them should afterwards be allowed to destroy that resolution by obtaining such an order.

4 Ch 480

There remains then the question whether an order ought to have been made on that part of the prayer of the Petition which seeks relief against the directors and officers. This question must depend upon the 165th and the 138th sections. Looking at it with reference to the 165th section, I am not altogether satisfied that that section was intended at all to apply to the case of a voluntary winding-up, and that the view of the Master of the Rolls, who seems to have thought that it did not apply to such cases, may not be correct; but I think the question open to very considerable doubt, and it does not seem to me to be necessary for us to give any opinion upon it, for, looking both to the words of the section being permissive and not imperative, and to the variety of cases in which the Court might be called upon to apply the section, I am satisfied that the Court was intended to have, and has, a discretion whether the remedy given by that section should be put in force or not. So, if the case be looked at with reference to the 138th section, it is clear that a discretion is given to the Court.

This part of the case therefore resolves itself into this question, what the Court ought to do in the exercise of this discretion. Upon the facts of the case, as they stand upon the evidence before us, I am satisfied that no order can properly be made on this part of the prayer of the Petition without further inquiry and investigation. I think that the evidence would not justify any immediate order against the parties whose conduct is impeached by the Petition, but I am not prepared to say that there are not questions to be tried with these parties if the Appellants desire to try them. Ought we, then, to exercise the summary jurisdiction which the statute gives by sending this case into Chambers with a view to the investigation of these questions? I am not disposed to do so. I agree with the Master of the Rolls that these questions will

be much better tried by bill than by inquiries under the summary jurisdiction. Experience has satisfied me that inquiries upon such questions as these are attended with enormous expense, and that there is much greater difficulty in arriving at a satisfactory decision under such proceedings than when the questions are distinctly raised in a suit between the parties. My opinion therefore is that if the Appellants intend to try these questions, they should proceed by bill; but I think that we ought, so far as we can, to remove any possible difficulty there may be in the way of their taking that course, and that leave ought therefore to be given to them to use the name of the company. I am of opinion, however, that if the Appellants desire to use the name of the company, they must indemnify them against the consequences; for I do not think that the Appellants, who are a minority of the contributories, ought to be permitted to try these questions at the expense of the estate, or that the distribution of the funds ought to be suspended with a view to these questions being tried, which would be the consequence of an unrestricted order for liberty to sue in the name of the company. If, therefore, the Appellants desire it, I think there may be an order upon this appeal to discharge the order at the Rolls, except as to the costs, and for the Appellants to be at liberty to file a bill in the name of the company as to the matters mentioned in the Petition; but this will make no difference as to the costs of the appeal; for if I rightly understand the judgment of the Master of the Rolls, he was willing to have made such an order had the Appellants desired it. The Appellants therefore must in any event pay the costs of the appeal. If the Appellants do not desire to take the liberty to sue in the name of the company upon the terms of indemnifying them, the appeal must be dismissed with costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

With great deference to the Master of the Rolls, I agree with my learned brother that this Petition ought not to have been altogether dismissed. As to the particular order which ought to be substituted for it, I have had some doubt, but not sufficient to induce me to object to the order proposed by my learned

L. JJ. 1865 BANK OF GIBRALTAR AND MALTA.

brother. I think I may consistently with my duty agree to that order.

Mr. *Jessel*.—We desire to have an opportunity of taking proceedings against the directors.

THE LORD JUSTICE TURNER:—Then the order will be that the Petitioners are at liberty to use the name of the company in such proceedings, they indemnifying the company, the indemnity to be settled by the judge in Chambers in case the parties differ.

In re HAYTOR GRANITE COMPANY.

L. JJ.
1865
Dec. 21.

Company—Winding up—Lease—Claim by lessor—Future rent.

A company, which had taken a lease of a quarry and covenanted for payment of the rent, was ordered to be wound up, and the leasehold interest was sold under the winding up. On the application of the lessor for leave to enter a claim for future rent, which had been refused by the Master of the Rolls, it was ordered that a claim should be entered for the whole value of the future rent, with the qualification that the lessor should not receive more than the amount which the company might become liable to pay under the covenant; the order to be without prejudice to any application to dissolve the company, but no order of dissolution to be made without notice to the lessor.

THIS was an appeal from a decision of the Master of the Rolls, reported Law Rep. 1, Eq. 11.

The *Haytor Granite Company* was incorporated in 1830 by a royal charter, which reserved a special power of revocation.

The Appellant had demised a quarry to the company for twenty-seven years and a half, by a lease dated the 2nd of March, 1857, containing a covenant for payment of a fixed rent. The company, by an order dated the 3rd of October, 1863, was ordered to be wound up under the *Companies Act*, 1862; and on the 17th of June, 1864, the lease was assigned to a purchaser.

The Appellant, no rent being in arrear, took out a summons for leave to enter a claim in respect of the amount of the future rent, on the ground that the company were liable under their covenant to pay it if default was made by the assignee of the lease. The Master of the Rolls refused the application.

Mr. *De Gex*, for the Appellant:—

The Appellant of course does not insist on receiving at once anything in respect of his claim; he only desires to be left in possession of the rights to which he is, or may become, entitled under the covenant. It is only in the event of the company desiring to free themselves from liability, that he seeks to have a provision made for his future demands. If his claim be not admitted on the proceedings, an order will be made, under s. 111 of the Act, for dissolving the company without the Court having any

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HAYTOR GRANITE CO.

notice of this claim, and the Appellant will entirely lose the benefit of the liability of the original lessee, which may be important, for the quarry may be worked out and the lease assigned to a pauper. The analogy of bankruptcy was relied on before the Master of the Rolls. But, in the first place, the Companies Acts have not for one of their objects to absolve companies from the fulfilment of their engagements, as the Bankruptcy Acts have with regard to individual debtors; they are merely intended to provide convenient modes of winding up the affairs of large partnerships, without depriving any one of his legal rights or demands. In the next place, even under the Bankrupt laws, a lessee is not discharged by his certificate from liability in respect of the subsequent performance of the covenant for payment of rent; nor, until a specific enactment was introduced for that purpose, could a bankrupt lessee, by giving up his lease, free himself from his liability under the covenants contained in it; *Auriol* v. *Mills* (1). *King* v. *Malcott* (2) relied on before the Master of the Rolls, is distinguishable. There the legatees might have been compelled to refund if the claim ever ripened to a debt, *Thomas* v. *Griffith* (3); and all that was decided was, that the lessor had no right to have assets impounded to meet a demand which might never arise. Here, what we want is to retain the power of proceeding against a subsisting company if anything should become due to us.

Mr. *Selwyn*, Q.C., and Mr. *F. Harrison*, for the official liquidator:—

It is essential that any claim made under section 158 of the *Companies Act*, 1862, be reduced to a certain amount. The claimant here, though repeatedly pressed, has been unable to estimate this amount, even approximately. Nothing is now due, and there is no evidence that anything will become due. The possibility of the lessee failing to pay his rent is a contingency which cannot be estimated. The lessor's claim to have the whole rent for twenty years impounded, is something for which he never contracted. The whole object and policy of the winding-up Acts is definitively to ascertain and satisfy at the time all claims against the partnership. But the result of this claim being allowed would be to suspend the winding up for a quarter of a century. *King* v.

(1) 4 T. R. 94. (2) 9 Hare, 692. (3) 2 De G. F. & G. 555.

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Malcott shews that a Court of equity will not set apart a sum out of a testator's assets to answer for possible breaches of covenants in a lease to him, and will not extend the legal right of the lessor. The Appellant, when he contracted with this company to grant them the lease, knew that he was contracting with a company liable to be dissolved under a notice by a Secretary of State, or by an order under the Winding-up Act, and no wrong will be done him by refusing the application. This is not "a debt payable on a contingency," for no actual debt has been incurred. This is only a contingent liability, which in all probability will never become a debt. No cause of action has arisen. A clear distinction has been drawn between a "debt payable on a contingency" and a "contingent liability" to become indebted. The language of the *Bankruptcy Act* of 1849, sections 177 and 178, and of the Act of 1861, section 153, is even more sweeping than that of the 158th section of the *Companies Act*, 1862. Yet, under the Bankruptcy Acts it has frequently been decided that a debt on which no good cause of action had arisen at the date of the fiat, cannot be proved; *Boyd* v. *Robins* (1), *Thomas* v. *Hopkins* (2), *Ex parte Kempson re Barker* (3), *Taylor* v. *Young* (4), *Ex parte Mendel* (5). These cases shew that even a contract upon which a future debt must certainly arise, but on which it has not yet arisen, does not constitute "a debt payable on a contingency." Lastly, the most startling consequences would follow if it were necessary, in winding up a company, to provide for the possible contingency of liabilities arising upon their contracts. There are few companies which have not held the lease of some premises, or given some warranty, or entered into certain engagements, upon which good causes of action might at a future time, under certain contingencies, arise. No company could be wound up if it were necessary to satisfy all such possible cases. All that can be done in winding up a company is to satisfy its actual creditors, and in this case the lessor has no claim against the company, that is or that can be ascertained.

Mr. *De Gex*, in reply.

(1) 5 Jur. (N. S.) 915.
(2) 6 Jur. (N. S.) 301.
(3) 11 Law T. (N. S.) 723, L. C.
(4) 3 B. & Ald. 521.
(5) 1 D. J. & S. 330.

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SIR J. L. KNIGHT BRUCE, L.J.:—

At present this company, which is on the point of being wound up, is under an obligation which may in the result expose it to considerable pecuniary liability. The Respondent desires that a course may be taken which will at once discharge it from this liability. The Appellant desires that the liability may be preserved, and that the winding up should proceed so far only as may be consistent with the fulfilment of the obligation, if any occasion for its fulfilment should practically arise. I am of opinion that the Appellant is entitled to this, but not so as to prejudice any right which the company may have, nor so as to extend its liability, nor to increase the weight of its responsibility, nor of its obligations, whatever they may be, but so as to leave matters to the operation of the law not affected by the mere circumstance of the winding up of the company. The Lord Justice agrees with me in substance, and has drawn up an order in which I concur.

SIR G. J. TURNER, L.J.:—

The question now before us is not what order ought to be made upon an application for dissolving this company, but whether the Court ought to be left in the position of having, at the time when the application may be made, no notice of there being unsatisfied claims against the company. The state of the case is this: The company have entered into a covenant which is binding upon them during the whole term of their lease. It is said that the amount of their liability under the covenant cannot be estimated. That may or may not be so; but if the certificate should take the shape for which the Respondent contends, the Court will have no opportunity of determining whether the liability can or cannot be estimated. It will be kept in ignorance of there being any claim against the company, although undoubtedly there is a valid legal claim against them for the whole of the rent which the assignee does not pay. This is not a position in which the Court ought to be placed. I do not mean to give any opinion whether the existence of this claim ought to prevent the making an order for dissolving the company. It may be that if, when the order for dissolution is applied for, it is found that the amount of liability

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cannot be ascertained, the order ought to be made, notwithstanding the existence of this claim; but that question does not yet arise. The order to be made at present is to the following effect: "Discharge the order of the Master of the Rolls, and direct the claim to be entered for the whole amount at which the future rent is estimated, but subject to the qualification that the amount to be received on the claim is not to extend beyond the amount to which the company may be liable on the covenant. This order to be without prejudice to any question upon an application for dissolving the company, but no order for dissolution to be made without notice to the Appellant. The costs of both parties here and at the Rolls to come out of the estate."

COLLIER *v.* McBEAN.

L. JJ.
1865.
Dec. 9.

Vendor and Purchaser—Estate of Trustees—Doubtful Title.

A testator gave real estate to trustees and their heirs, upon trust that they and their heirs should stand seized thereof during the life of *W. C.*, and also until the testator's debts and legacies were paid, upon the trusts hereinafter mentioned, namely, upon trust to set and let the same, and apply the rents in payment of his debts and legacies, until they were all paid, and thenceforth to pay the rents to *W. C.* during his life, and after the decease of *W. C.*, and the payment of all the debts and legacies the testator devised the estate to the heirs of the body of *W. C.* After the debts and legacies had been paid, the trustees conveyed the legal estate for the life of *W. C.* to him, it being assumed that they had only an estate *pur autre vie*. *W. C.* then suffered a common recovery. *W. C.* having afterwards contracted to sell the estate. The Master of the Rolls held that the trustees did not take the whole fee, but only a fee determinable on the payment of the debts and legacies and the death of *W. C.*; that the rule in *Shelley's Case* did not apply, and that the title was bad.

Per KNIGHT BRUCE, L.J.—*Semble*, the trustees took the entire fee, and the title was good.

Held, by both their Lordships, that as the view that the trustees did not take the entire fee had been acted on for many years, and the Master of the Rolls was of opinion that they did not, the title ought not to be forced on a purchaser.

THIS was an appeal by the Plaintiff, a vendor, from an order of the Master of the Rolls, dismissing with costs his bill for specific performance.(1)

(1) Reported 11 Jur. N.S. 592. 34 Beav. 426

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James Collier, by will dated the 23rd of May, 1827, after directing his funeral expenses and the expenses of proving his will to be paid out of his personal estate, proceeded as follows :—

"I give and devise all that my freehold messuage, &c., together with all my farming stock, and all other the residue of my personal estate and effects, whatsoever and whensoever, unto my brother *Joseph Collier*, and my sister *Hannah Collier*, their heirs and assigns, and to the survivor of them, and his or her heirs, upon the several trusts, and to and for the several uses, ends, intents, and purposes hereinafter named and expressed of and concerning the same, that is to say, as to [here followed trusts of the personalty], and as to, for, and concerning all my above-mentioned real estate, upon trust that they, the said *Joseph Collier*, and *Hannah Collier*, and their heirs, and the survivor of them, and his or her heirs, shall stand seized of the same for and during the natural life of my brother *William Collier*, and also until the whole of my just debts and all interest due or to grow due thereon, together with the following legacies, be fully paid off, and discharged, to, for, and upon the several uses, trusts, ends, intents, and purposes hereinafter named, that is to say, upon trust to set and let the same, and to pay and apply the rents, issues, and yearly profits thereof, and the value of whatever timber may be considered at its best growth, from time to time, in further discharge of my said just debts, and of all interest due or to grow due thereon, until the same shall be fully paid off and satisfied; and upon further trust to pay and apply the rents, issues, and yearly profits thereof from time to time in discharge of and until the whole of the three following legacies, which I hereby bequeath, be fully paid and discharged, that is to say [here followed a gift of three legacies]; and from thenceforth upon further trust, to pay over from time to time the rents, issues, and yearly profits, of the said premises unto my said brother *William Collier*, or his assigns, for his use and benefit for and during the term of his natural life, and from and immediately after the decease of my said brother *William Collier*, and the payment of all my just debts as aforesaid, and also the legacies above mentioned, together with all expenses which my said trustees or any or either of them may be at or put unto in the execution of this my will, I do hereby give and devise

my said real estate unto the heirs of the body of my said brother *William Collier*, lawfully to be begotten, and for default of such issue, then I give and devise the same unto the right heirs of me the said *James Collier*, for ever."

The testator died soon after the date of his will. By indenture of lease and release dated the 4th and 5th of June, 1830, reciting that the debts and legacies had been paid, and that *William Collier* had requested the trustees to convey the estate to him for the term of his natural life, which they had agreed to do, the trustees conveyed the estate to him and his assigns for his life. In the same month *William Collier* conveyed the estate to a tenant to the *præcipe*, and suffered a common recovery. He was not the testator's heir at law.

William Collier having, in 1862, contracted to sell the estate to the Defendant, this suit was instituted, and the Master of the Rolls held that the trustees of *James Collier's* will did not take the entire fee, but a fee determinable on the death of *William Collier*, and payment of the testator's debts and legacies; that the limitations to *William Collier* and to the heirs of his body therefore could not coalesce under the rule in *Shelley's Case;* and that *William Collier* therefore had only a life estate and could not make a title. His Honour accordingly dismissed the bill with costs.

Mr. *Selwyn*, Q.C., and Mr. *Jervis*, for the Appellant:—

If the trustees took the entire fee in the legal estate, the title is confessedly good, and we submit that beyond all reasonable doubt they did; *Doe dem Cadogan* v. *Ewart* (1), *Doe dem Davies* v. *Davies* (2), *Poad* v. *Watson* (3), *Doe dem Kimber* v. *Cafe* (4). The Master of the Rolls held that they took a fee simple determinable on the debts being paid; but no modern case warrants a construction which would give them such an estate (5), and the observations of Lord *Hardwicke* in *Bagshaw* v. *Spencer* (6), that the limitation over would be void for remoteness, is conclusive against it. *Jones* v. *Lord Say & Sele* (7), is the only case that can be referred

(1) 7 Ad. & E. 636.
(2) 1 Q. B. 430.
(3) 6 E. & B. 606: 2 Jur. N.S. 1135.
(4) 7 Exch. 675.
(5) See *Glover* v. *Monckton*, 3 Bing. 13; *Heardson* v. *Williamson*, 1 Keen, 33.
(6) 2 Atk. 577, 578.
(7) 8 Vin. Abr. 262, pl. 19; 1 Eq. C. Ab. 383, pl. 4.

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to against us, and the authority of that case is questioned by Mr. *Butler* (1), and Justice *Laurence*, in *Doe dem White* v. *Simpson* (2), treats it as a case depending on its own circumstances and furnishing no rule for others. In *Doe* v. *Simpson* itself the trustees were held to take a chattel interest superadded to an estate *pur autre vie* which they took for other purposes; but besides other special circumstances, it is to be observed that in that case the devise was to the trustees, their executors and administrators. The direction to set and let is alone enough to give the trustees the fee; *Doe* v. *Willan* (3).

Mr. *Cole*, Q.C., and Mr. *Ince*, for the purchaser:—

It is not necessary for us to establish any particular construction of the will which would be fatal to the Appellant's title, it is enough to make out that it is doubtful whether the trustees take the fee, which is the only construction that would make the title good. Probably the true construction may be that adopted in *Doe* v. *Simpson*, that they took an estate *pur autre vie* with a chattel interest superadded; and if either that view or the view of the Master of the Rolls be correct, the title is bad. The parties acted for a number of years on a view of the title opposed to the Plaintiff's contention, and the Court will not force such a title upon us.

[They were here stopped by the Court.]

THE LORD JUSTICE KNIGHT BRUCE:—A construction of this will opposed to that for which the vendor now contends having been acted upon for a number of years, and being supported by the opinion of the Master of the Rolls, can a Court of appeal, consistently with the principles on which the Court acts in cases of specific performance, force upon a purchaser a title which depends upon the soundness of the opposite construction?

Mr. *Jervis*, in reply, upon the question of doubtful title.

SIR J. L. KNIGHT BRUCE, L.J.:—

My present impression, liable to be changed by further argument on the part of the Respondents, is, that the trustees of *James*

(1) Fearne Court Rem. 54, n. (2) 5 East, 162. (3) 2 B. & Ald. 84.

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Collier's will took the entire legal fee, and that the title of the Appellant is good. A different construction of the will has, however, been acted upon for a number of years, and is supported by the opinion of the Master of the Rolls. In these circumstances I think that we ought not to force the title on a purchaser.

SIR G. J. TURNER, L.J. :—

The purchaser is entitled to require a marketable title, and the judge whose decision is appealed from having pronounced the title bad, I think that we ought not to force it upon the purchaser unless we can come to the conclusion that his opinion is clearly erroneous. I agree, therefore, that this appeal must be dismissed.

L. JJ.
1865
Dec. 5, 6.

In re LLANHARRY HEMATITE IRON COMPANY.

TOTHILL'S CASE.

Winding up—Contributory—Application for Shares—Qualification of Director—Minute-Book—Entry.

A director of a railway company signed the articles of association as a holder of twenty-five shares, but applied for fifty shares, which was the qualification of a director under the articles. No allotment of shares was made :—

Held, varying the decision of the Master of the Rolls, that he was a contributory for twenty-five shares only.

A resolution was passed at a meeting of directors, reciting a list of shareholders, in which the Appellant, who was a director, was put down for fifty shares. The Appellant was not present at the meeting, and denied all knowledge of the resolution, although he was present at the next subsequent meeting :—

Held, in the absence of proof that the minutes of the previous meeting were duly read and confirmed at the subsequent meeting (which it appeared was not always done), that the Appellant was not bound by the insertion of his name for fifty shares.

THIS was an application on behalf of Mr. *F. Tothill*, one of the contributories of the *Llanharry Hematite Iron Company, Limited*, that an order made by the Master of the Rolls on the 7th November, 1865, might be discharged, and that the list of the contributories of the company might be varied by reducing the number of shares for which Mr. *Tothill* was placed on the list from fifty to twenty-

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five, and that a corresponding reduction might be made in the call made in respect thereof.

The company was formed for the purpose of working certain iron mines, and was registered under the *Companies Act*, 1856.

The prospectus was issued in July, 1860. Mr. *Tothill* consented to join the board of directors, and signed the memorandum of association, which was registered on the 12th of March, 1861, for twenty-five shares. He also signed the articles of association, which contained the following clauses:—

"No person shall be deemed to have accepted any shares in the company unless he has testified his acceptance thereof in writing under his hand, in such form as the company from time to time directs.

"The following persons shall be the first directors of the company. Sir *C. P. Roney*, *J. S. Adam*, *J. O. Stock*, *F. Tothill*, and *C. H. Waring*, Esqrs.

"No person shall be eligible as a director of the company, unless he shall hold, in his own right, fifty shares at the least.

"The directors shall cause minutes to be made in books provided for the purpose—

"Of all appointments of officers made by the directors.

"Of the names of the directors present at each meeting of directors and committees of directors.

"Of all orders made by the directors or committees of directors.

"And of all resolutions and proceedings of the company, and of the directors and committees of directors.

"And any such minutes as aforesaid if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, shall be receivable as evidence, without any further proof."

On the 12th of April, 1861, Mr. *Tothill* sent in an application for fifty shares, and paid £50 for the deposit of £1 on each share with the bankers of the company. The letter of application was in the usual form, requesting the directors to allot the applicant "fifty shares in the above company, or any less number, subject to the regulations of the company."

Several meetings of the directors were held, but no formal

allotment of shares was ever made, nor was any register of shareholders kept; but at a meeting held on the 3rd of September, 1861, the following resolution was passed:—

"On a calculation of the capital with which the company could be started under the contract for raising, proposed by Mr. *Davies*, it was found that from £750 to £1000 would be sufficient for one year's working, and seeing that 660 shares, equal to £6600, are subscribed for as follows—"

Then followed a list of shareholders with the number of shares subscribed for by each, among which appeared the names of Sir *C. P. Roney* for 100 shares, and Mr. *Tothill* for 50 shares; and the resolution proceeded: "It was resolved after due consideration to proceed forthwith with the company, &c."

Although the resolution was entered in this form in the minute-book, and signed by Sir *C. P. Roney* as chairman, it appeared that in the rough minute taken by the secretary, Mr. *S. J. Green*, the list was not set out, but the names were taken from a pencil list on a separate paper, made out by the secretary. The rough minute was also signed by Sir *C. P. Roney*.

Mr. *Tothill* was not present at the meeting of the 3rd of September, but he attended the next meeting, which was held on the 11th of September, at which the minutes of the last meeting ought in due course to have been read and confirmed. But it appeared from the evidence of the secretary, that sometimes the minutes were not confirmed till the second or third subsequent meeting; and there was no evidence that in this particular case the minutes of the meeting of the 3rd of September were confirmed at the next meeting. Mr. *Tothill* expressly denied that he had ever seen or heard of the resolution of the 3rd of September, until after the proceedings for winding up the company.

Mr. *Tothill*, in his affidavit, deposed as follows:—

"I attended a meeting of the first directors on the 4th of March, 1861; but it was found that the public did not support the company, and no allotment of shares was made. I was not present at the meeting of the 3rd of September, 1861, upon which the official manager relies, and I never saw the resolution which now appears

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entered in the minute-book of that date; nor did I ever hear of it to the best of my recollection and belief, until after proceedings had been taken to wind up the company; and I first heard of it through my solicitor. I certainly never received any notice of allotment. I never saw the paper writing (the list of members), produced to and referred to in the evidence of the secretary, Mr. *Green*, taken in this matter. I attended a meeting of the company on the 11th of September, 1861; but no reference was made at that meeting to the minute which is so entered in the minute-book, under the 3rd of September, 1861, to the best of my recollection and belief. And I did not attend any other meeting until the month of June, 1862, and that meeting was called for the purpose of winding up the affairs of the company."

On the 24th of January, 1863, an order was made for winding up the company. Mr. *Tothill's* name was placed by the chief clerk on the list of contributories for fifty shares; and his case was brought before the Master of the Rolls on an adjourned summons.

Sir *C. P. Roney* and Mr. *Stock*, another director, who were put upon the list of contributories by the chief clerk, for a hundred shares and fifty shares respectively, also contested the decision of the chief clerk, and their cases were heard before the Master of the Rolls on the 27th of April, 1865 (1), when his Honour decided that Sir *C. P. Roney* was bound by his own signature as chairman, and must remain on the list as a contributory for a hundred shares; but reduced the number for which Mr. *Stock* was liable to twenty-five shares. This decision on both points was affirmed by the Lords Justices on the 23rd of June, 1865 (2).

Mr. *Tothill's Case* was heard by the Master of the Rolls, on the 7th of November, 1865, when his Honour agreed with the chief clerk, and decided that Mr. *Tothill* must be held as a contributory for the whole of the fifty shares.

Mr. *Baggallay*, Q.C., and Mr. *Millar*, for Mr. *Tothill*:—

An application for shares and payment of deposit do not constitute the applicant a contributory if there has been no allotment: *Best's Case* (3). It has also been decided that the consent of a person to act as director does not amount to an agreement to take

(1) 12 W. R. 815. (2) 12 W. R. 994. (3) 13 W. R. 762; 34 L. J. Ch. 523.

the number of shares required for a qualification; *Marquis of Abercorn's Case* (1). Besides which, it has been held that in this case the qualification only applies to future directors; *Stock's Case* (2). Mr. *Tothill* signed the memorandum and articles of association for twenty-five shares only, and the only pretext for fixing him with fifty shares is the appearance of his name in the list drawn up on the 3rd of September. But there is no proof that he knew anything of that list, and he distinctly denies all knowledge of it in his affidavit. In this respect his case differs from that of Sir *C. P. Roney*.

Mr. *Southgate*, Q.C., and Mr. *Swanston*, for the official liquidator:—

In *Best's Case* there was merely an application for shares, and payment of deposit, and no further communication with the company. Here the applicant was a director, and acted in the management of the company.

In the *Marquis of Abercorn's Case* (1), the Marquis had never applied for a qualification, and had no notice of the amount of stock necessary. Mr. *Tothill* knew the qualification, and applied for that exact amount of shares, intending thereby to qualify himself.

Mr. *Tothill* cannot be permitted to say that he knew nothing of the list of shareholders. He was present at the meeting of the 11th of September, and as a director must be supposed to be cognizant of what took place at the previous meeting.

They also cited the following cases:

Maudslay and Field's Case (3); *Carmichael's Case* (4), *Yelland's Case* (5); *Cookney's Case* (6); *Bloxam's Case* (7); *Thompson's Case* (8).

Mr. *Baggallay*, in reply.

SIR G. J. TURNER, L.J.:—

This is an application on the part of Mr. *Tothill* to have the number of shares for which he is placed on the list of contribu-

(1) 10 W. R. 548.
(2) 12 W. R. 814; s. c. on appeal, *Ibid.* 994.
(3) 17 Sim. 157.
(4) *Ibid.* 163.
(5) 5 De G. & S. 395.
(6) 3 De G. & J. 170.
(7) 12 W. R. 995.
(8) 13 W. R. 958.

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tories reduced from fifty to twenty-five. He signed the memorandum of association for twenty-five shares only, and the question now is, whether he is to be held to have agreed to take twenty-five more. The case is first put on Mr. *Tothill's* application for fifty shares. On the 12th of April, 1861, he paid £50 into the bankers of the company as a deposit on fifty shares, and made a formal application in the form prescribed by the prospectus. This application was in the following terms. "I hereby request you to allot me fifty shares in the above company, or any less number, subject to the regulations of the company." It is clear that no allotment was ever made of these fifty shares to Mr. *Tothill*. So far, then, as the case rests merely on the application, it falls to the ground; for there was no agreement on the part of the company to accept his proposition to make an allotment to the extent of fifty shares to him.

The sole question therefore is, whether there was an agreement between Mr. *Tothill* and the company for him to become the holder of fifty shares, independently of the application. To establish this, two points are relied on—First it is said that there was a resolution of the directors on the 3rd of September, 1861, in which was embodied a list of persons who had agreed to become subscribers for shares, and that in this list the name of Mr. *Tothill*, who was a director of the company, appears for fifty shares. This resolution found its way into the books of the company in this form—There was about to be a contract for opening the mine, and it was necessary to ascertain what capital had been subscribed for, and it was stated in the resolution that "it was found that from £750 to £1000 would be sufficient for one year's working, and seeing that 660 shares, equal to £6600 are subscribed for as follows"—And then follows a list of names, including Mr. *Tothill's* for fifty shares.

Independently of the entry in the books, a list was produced, made out by the secretary, from which the entry in the books was copied; and it is said that either by force of the resolution, or by his being included in the list made by the secretary, Mr. *Tothill* was bound to take these shares.

First, as to the resolution. Mr. *Tothill*, in distinct terms, says in his affidavit thus:—"I was not present at the meeting of the

3rd of September, 1861, on which the official manager relies, and I never saw the resolution which now appears entered in the minute book of that date, nor did I ever hear of it to the best of my recollection and belief until after proceedings had been taken to wind up the company, and I first heard of it through my solicitor. I certainly never received any notice of allotment."

Here is a positive denial on his part. Either it is true or untrue. If untrue, I wish to know why no questions were put to him by the official liquidator in cross-examination, although he made himself liable to cross-examination. Not one single question was put, and I cannot therefore assume that his statement is untrue. If, then, this statement is true, it seems to me impossible that we can hold that this was an agreement on the part of Mr. *Tothill* to take fifty shares, or an agreement by the company to allot them to him.

But it was said that though Mr. *Tothill* never saw the resolution he must be presumed, as a director, to know what appeared on the books of the company. But what was it that appeared on the books? There is no proof that this entry was on the books at the time when he attended, and it is clear that the rough minute did not contain the list of names, but only the statement that £6600 had been subscribed for, a statement which could not be extended to make him liable for fifty shares. In the face of the evidence it would be unfair to presume a knowledge on the part of Mr. *Tothill* of a list which I do not believe existed on the books at the time when he attended the board.

Something might be said on the question, whether, if he had been fixed with knowledge of the list he could be made absolutely liable; but it is unnecessary to decide this. At the same time I must remark that the object of the resolution was to find what amount of shares had been subscribed for, and not by whom the capital was to be taken. Nothing in the list would give Mr. *Tothill* the shares which he had applied for. It is difficult to say that because a company makes out a list of subscribers in order to see whether they can carry on the company, they are bound to give the shares in conformity with the list. Suppose the scheme had turned out profitable, and a great number of persons had come in and applied for shares; could the company have said, "We cannot

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part with any of the 660 shares which are entered as subscribed for"? This seems to distinguish the case from *Bloxam's Case* (1), where there was an entry which would have bound the company to give the shares to *Bloxam*. I am therefore of opinion that Mr. *Tothill's* name must be struck off the list for twenty-five of the shares attributed to him, but there will be no costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

This case is one of singular difficulty, but not so much so as to render it unfit to decide the right. The circumstances and the evidence are such as to render it proper in deciding the case to have regard to the question on which side the burden of proof lies. I am of opinion that the burden of proof lies on the Respondent, and I cannot say he has discharged that burden. I agree with my learned brother. I repeat that it is a case of great difficulty.

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ATTORNEY-GENERAL *v.* ST. JOHN'S HOSPITAL, BATH.

Charity—Scheme, Power of Court to alter—Renewable Leases—Fines.

The Court has power to alter from time to time the scheme of a charity which has been settled by a previous decree of the Court, if the circumstances require it.

The Court refused to permit the renewal of leases of the lands of a charity on fines, although the practice had been sanctioned by a scheme settled by the award and decree of the Court, and had been acted on since under the direction of the Court.

The custom of an ancient charity had been that the lessees of the charity lands should have renewals of leases on easy and beneficial terms. The Court nevertheless in settling a scheme refused to permit leases to be granted except at rack rent: but directed that in granting fresh leases, regard should be had to the claims of any lessees who had expended money on the faith of renewals.

THE *Hospital of St. John the Baptist,* with the *Chapel of St. Michael,* annexed, in the city of *Bath,* was founded, according to tradition, in the year 1174 by one of the Bishops of *Bath* and *Wells;* but no record or memorial is extant of the particulars of its

(1) 12 W. R. 995.

foundation. The right of presentation to the mastership was vested in the corporation of *Bath* by a grant of Queen *Elizabeth*, in the fifteenth year of her reign, and the right is now exercised by the trustees of the municipal charities of that city by virtue of an order of the Court of Chancery.

The present system of management of the hospital is derived from an award of Sir *John Trevor*, the Master of the Rolls, made in 1716 in a suit of *Attorney-General* v. *Clement*.

The information in that suit was filed by the Attorney-General on the relation of the master, co-brethren, and sisters of the hospital on behalf of themselves, and the tenants of the lands of the hospital, against *Thomas Clement* and the mayor, aldermen, and burgesses of *Bath*, for the purpose of setting aside a lease obtained by the Defendant *Clement* from his father, the late master of the hospital, and of having rules and orders made for the future management of the charity property.

The information stated, among other things, that the hospital was founded for the support of poor men and women, for whom an almshouse had been built; that before the dissolution of monasteries the abbots of *Bath* used to elect a master for the hospital, and a rector for the chapel, and that the master, with the approbation of the abbot, co-brethren, and sisters, renewed the leases of the hospital lands, as lives dropped, with usual covenants; that as the revenues of the hospital increased, so from time to time the poor men and women were increased in number and necessaries; that the master had an allowance of £30 per annum, for reading prayers, and a house; and that 2*s.* 6*d.* was appointed weekly to each poor man and woman, besides washing and coals, and a gown once in two years, and some allowance was made for repairs; that the poor men and women had fitting apartments, and, as vacancies happened, the master had the nomination of them; that the revenues by the reserved rents and dropping of lives were then estimated at £600 per annum, and were just sufficient for maintaining the poor; but, as the revenues increased, the sums, according to the founder's intention, ought to have been applied to the poor allowances, and an addition of more men and women; that not only the yearly rents, but the fines on granting estates for lives, were intended by the founder for the benefit, not only

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of the almshouse, but of the tenants of the same, for such lives as they should from time to time name at reasonable and moderate fines.

The information further stated that the city of *Bath* had been since much enlarged and many large houses had been built on the hospital lands, whereby the rents and revenues were increased to above £1000 per annum, if in hand, and the quit or reserved rents to £140 16*s.* 2*d.*, besides what might be raised by fines in granting estates by leases or copy of court roll.

The information then stated the circumstances under which the Defendant *Clement* obtained a lease for three lives of the hospital lands from his father, the late master, on his death-bed, and alleged that the Defendant had made large sums of money by granting leases for lives, and had reserved the rents to himself without taking any notice of the hospital; and that the tenants, in respect of a tenant's right of renewal, had laid out above £5000 in building spacious and sumptuous buildings for the entertainment of persons of quality and others using the baths and the waters there, and that, in case they had not the benefit of renewing their respective estates upon reasonable terms and consideration to what they and their predecessors had laid out in building, many of them must be utterly ruined.

It then stated that *Clement* had affrighted and obliged several of the tenants to agree to his terms, knowing that they had laid out their whole fortune in building houses on the hospital lands, and threatened the others with ejectment, and to sell their estates to other persons who would give more for them; although he knew that each tenant of the hospital was entitled to a tenant right, and that all the tenants had, and ought to have, easy and good bargains, and were, and ever were, looked upon to be within the charitable design and intention of the founder.

The information prayed for a discovery of the deeds in the Defendant's possession, and that his lease might be set aside, and that such rules and orders might be made for the management of the charity estates, and the government of the charity for the future, as the Court should think fit.

The cause came on for hearing before the Master of the Rolls on the 26th of November, 1713, when all parties consenting to

submit all matters in question to the award and final judgment of his Honour, an order was made that the parties should attend him with all the pleadings, depositions, and exhibits in the cause, and with a copy of the grant from Queen *Elizabeth* to the city of *Bath*, and other documents therein mentioned, and his Honour would advise with the Lord High Chancellor, and with the Bishop of *Bath and Wells*, and consider the whole cause, and then make his award, judgment, and final determination touching the several matters in question.

In pursuance of this decree Sir *J. Trevor* made his award, dated the 13th of February, 1716, in which he referred to the history of the hospital, and recited the submission to him, and stated that for the final award, determination, &c., settlement of all the premises to him referred, and for settling all disputes that had arisen or should arise touching the management of the said hospital, and of the possessions and revenues thereof, for the present and time to come, and for giving satisfaction to the contending parties in respect to their several claims, and for the better and more orderly government of the said hospital, and for a better provision for the poor thereof, and for the rebuilding of the chapel, and for the more due and decent daily service to Almighty God to be performed in the chapel, and repairing the said hospital, and for establishing rules and orders for the management of the same, he awarded (among other things) as follows:—

1. That the Defendant *Clement's* lease should be set aside and cancelled.

2. That the Defendant *Clement* should reserve for his own use £1500 and interest, out of the fines thereafter set forth in consideration of his father's services, as master of the hospital.

3. That there should be new leases made to the several and respective tenants of the hospital lands, not exceeding three lives, to be nominated by the several and respective tenants, and that the rents should be reserved, and the fines be paid for the same according to their voluntary offer and proposal, contained in a particular or schedule thereto annexed, amounting together to the sum of £3190 11*s.* 6*d.*, with interest after the rate of 4 per centum per annum, which being computed for the same from the

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said 4th day of December, 1711, to the 29th day of September, 1716, inclusive, amounted to the sum of £612 13*s.* 6*d.*, and being added to the principal, made in the whole £3803 5*s.*, which with the addition of the sum of £118 15*s.*, arrears of the additional rents which were to be paid by the several tenants according to the said particulars, on the granting their new leases to Michaelmas, 1716, amounted to £3922, which sum he, the said Master of the Rolls, ordered the respective tenants to pay to and deposit with Mr. *Thomas Bushell*, of the said city of *Bath*, vintner, to be issued and applied as thereinafter directed. And by the same clause it was ordered that the leases should in future be drawn by the Town Clerk of *Bath* in a prescribed form.

The 4th, 5th, and 6th clauses were immaterial to the present question.

7. That the residue of the said sum of £3922, after payment from it made of the said £1500 and interest, to the Defendant *Clements*, should be applied in manner following—namely, first to pay to all parties their costs, &c., and the remainder (after deducting £540 reserved for building the said chapel, and repairing the hospital), amounting to £876 6*s.*, should be applied as thereinafter directed.

8. This clause contained directions for the application of the ordinary rent and revenues of the hospital, and of the interest of the said sum of £876 6*s.*, which was to be invested.

9. That all fines upon the leases to be made after the leases thereinbefore directed should be thereafter received by the master for the time being, to the uses and purposes following—namely, two-thirds thereof to the use of the master, he thereout keeping the clock, and the chapel, and the windows, and all other parts thereof in good repair, and the remaining third part thereof for the benefit of the said co-brethren and sisters, to be paid and distributed to them monthly in equal shares.

10. That the right of the presentation of the master belonged to the Corporation of *Bath*, by the grant of the 15th of Queen *Elizabeth*, but that they had no right to be visitors; and that the government of the hospital should be in the master, according to the rules thereunto annexed, with certain provisions as to service in the chapel.

The 11th and 12th clauses were immaterial.

13. That the master with the consent of the brethren and sisters for the time being, might, under their common seal, from time to time, as any of the leases should be surrendered or determined, or upon the death or deaths of any life or lives, or upon the changing of any life or lives, grant new leases not exceeding three lives at the most, to be nominated by the several and respective tenants, reserving the same rents as were thereby respectively reserved, and that the fines to be taken on renewing such lease should not exceed one year's value for a life, according to the particular annexed, adding thereto the interest for the time such renewal should be neglected by the tenant, to be computed from the end of six calendar months after the former life determined, and the rents or fines were not to be increased without the leave of the said Court of Chancery.

The 14th clause was immaterial.

15. That the Lord Chancellor, Lord Keeper, the Master of the Rolls, and Lord Bishop of *Bath and Wells* for the time being, or any two of them, should from time to time respectively for ever be visitors of the said hospital.

Annexed to the award were certain rules and orders for the internal government of the hospital.

The schedule appended to this award contained in separate columns the names of the then tenants of the estates; the amount of the fine which each of the then tenants was to pay on the renewal of his lease; the amount of the interest which each tenant had to pay according to the award; the amount of the rent payable by each tenant; the amount by which each tenant's rent had been increased; and the annual value of the holding of each tenant.

By an order made in the cause, and bearing date the 25th of June, 1717, it was ordered that the said award, and all the matters and things therein contained, should stand ratified and confirmed by the order, authority, and decree of this Court, unless the Defendants, having notice thereof, should within eight days after such notice shew unto the Court good cause to the contrary.

No cause to the contrary appears to have been shewn, and the

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settlement made by this award had been acted upon up to the present time. Several applications had been made from time to time to the Court of Chancery in the suit of *Attorney-General* v. *Clement*, under the 13th clause, when it was desired to raise the fines on renewals. These applications, so far as they are known, were as follows:—

In 1728 a petition was presented to Lord Chancellor *Hardwicke* by the master, co-brethren, and sisters, praying that they might be at liberty to grant a renewal of a lease of a farm called *St. John's Farm*, to one *Jones*, on his paying a fine of £250, and of £300 for each fresh renewal. The Lord Chancellor made an order on the 27th of July, 1738, that they should grant a renewal on a fine of £600 for the life which had dropped.

On the 26th of March, 1753, an order was made by the same Lord Chancellor, on the petition of the lessees of *St. John's Farm*, that a new lease should be granted, another life having dropped, on payment of a fine of £1000. The Petitioners had offered to pay £600, but the Lord Chancellor considered £1000 to be a reasonable fine.

On the 21st of June, 1753, Lord *Hardwicke* made an order, on the application of the hospital, sanctioning the renewal of the leases of certain small farms, on payment of the fines proposed by the tenants.

In 1776, the suit of *Somerville* v. *Chapman* was instituted by the under-tenants of *St. John's Farm*, who held their underleases on the same lives as those named in the original lease, against the devisees of *Jones* (the late tenant) and the corporation of the hospital, the plaintiffs praying that the corporation might grant the devisees a renewal of the lease on payment of £2000, or such other fine as the Court might think reasonable, and that the devisees might grant the plaintiffs renewed underleases for the same lives. While the suit was pending, the devisees of *Jones* presented a petition, in *Attorney-General* v. *Clement*, praying that the corporation might be directed to grant a renewal of their lease upon the above-mentioned terms, but the Lord Chancellor (Lord *Apsley*), on the 7th of April, 1776, dismissed the petition, but on what grounds does not appear. The suit of *Somerville* v. *Chapman* afterwards came on to be heard

before Lord *Thurlow* (then Lord Chancellor), who dismissed the bill (1).

In 1823, the Master and Governors of the *Bath Infirmary* presented a petition in the original suit, praying that a renewed lease of the land held by them of the hospital might be granted on payment of the fine of £36, which was the annual value given in the schedule to Sir *J. Trevor's* award. Lord *Eldon*, who was then Lord Chancellor, although he doubted the jurisdiction of the Court, yet, as it had been exercised by Lord *Hardwicke*, made an order on the petition, and referred it to the Master to ascertain the amount of fine to be paid (2).

The Master reported that £300 was a reasonable fine, and Lord *Eldon* confirmed that report, overruling the exceptions which had been taken to it, on the 19th of March, 1825.

The present information was filed by the Attorney-General, *ex officio*, against the master, co-brethren, and sisters of the hospital, and the trustees of the municipal charities of *Bath*, in whom the right of presentation to the mastership was vested, praying for a scheme for the future administration of the charity, and for a special declaration that it was for the benefit of the charity that the Master, &c., of the hospital should not, in future, let any charity property on fines, or for long terms of years, or otherwise than at the best rent they could procure. After the cause had been set down for hearing, one of the lives on which many of the leases were held dropped, and the Attorney-General filed a supplemental information stating this fact, and praying for an injunction to restrain the corporation from granting any renewals on fines. An injunction was moved for before Vice-Chancellor *Kindersley*, in terms of the prayer, which was refused by the Vice-Chancellor, but was granted by the Lords Justices, on appeal, on the 1st of June, 1865.

Two petitions were also presented by lessees, praying for renewals of their leases on payment of the usual fines, and these petitions came on with the cause when it was brought to a hearing. The cause and the petitions were set down before the Vice-Chancellor, but in consequence of his Honour doubting his jurisdiction

(1) 1 Bro. C. C. 61.
(2) *Attorney-General v. Clement*, T. & R. 58.

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to disturb the award of Sir *J. Trevor*, they were heard as an original matter before the Lords Justices.

The *Attorney-General*, Mr. *Baily*, Q.C., and Mr. *T. H. Terrell*, in support of the information:—

The award of Sir *J. Trevor* does not take away the power of the Court to settle a new scheme when the circumstances of the case require it. The Court is not fettered by an old scheme of a charity, but may continually remodel it. *Attorney-General* v. *Wyggeston Hospital* (1), *Attorney-General* v. *Bovill* (2), *Attorney-General* v. *Corporation of Rochester* (3), *Attorney-General* v. *Bishop of Worcester* (4).

The corporation had no power to bind the charity by a covenant for perpetual renewal. It would have been contrary to the 13 Eliz. c. 10, and independently of the statute it would have been a breach of trust. *Magdalen College Case* (5), *Watson* v. *Hemsworth Hospital* (6), *Clayton* v. *Attorney-General* (7), *Attorney-General* v. *Brooke* (8).

The tenants are not objects of the charity. When an intention is shewn by the founder of a charity to give beneficial leases to third parties, the Court always disregards it, as tending to a perpetuity. *Attorney-General* v. *Catherine Hall* (9), *Hope* v. *Corporation of Gloucester* (10), *Attorney-General* v. *Greenhill* (11).

The award of Sir *J. Trevor* gave no right of renewal to the lessees. This is shewn by the cases in which applications have been made to the Court. Sometimes the Court fixed the amount of fine arbitrarily, which is inconsistent with such a right, and sometimes refused a renewal altogether. Nor have the tenants any moral claim. They have made large profits out of the hospital lands, and if there are any cases of hardship we are willing that they should be specially considered.

Mr. *Glasse*, Q.C., and Mr. *Bird*, for the hospital.

(1) 12 Beav. 113.
(2) 1 Phil. 762.
(3) 5 De G. M. & G. 797.
(4) 9 Hare, 328.
(5) 11 Rep. 66 b.
(6) 14 Ves. 324.
(7) 1 P. Coop. 97, 134
(8) 18 Ves. 319.
(9) Jac. 381.
(10) 7 De G. M. & G. 647.
(11) 33 Beav. 193.

Mr. *Jolliffe*, for the trustees of the municipal charities of *Bath*.

Sir *Hugh Cairns*, Q.C., Mr. *Osborne*, Q.C., and Mr. *C. Hall*, for the petitioners:—

The information in *Attorney-General* v. *Clement* was filed by the master and brethren on behalf of themselves and the tenants, and from the frame of the information, as well as from the allegations contained in it, it is clear that they were at that time considered as objects of the charity. One object of the founder was to encourage the improvement of the city of *Bath*. The same intention of benefiting the tenants is shewn in the award of Sir *J. Trevor*.

The scheme laid down by the Master of the Rolls is binding upon the Court; confirmed as it has been by the constant practice of renewals, on the faith of which the property has been so long dealt with. The dismissal of some of the subsequent applications for renewals is not conclusive against the petitioners. In the case where the petition was dismissed by Lord *Apsley*, the reason for the decision is not given; there may have been breaches of covenant. In the case of *Somerville* v. *Chapman*, the plaintiffs were the underlessees. The lessees did not support the bill. Their petition had been dismissed, and they had no longer any interest.

We contend that the tenants' right of renewal ought to be recognized in the scheme, but this can be done in such a way as may be considered most beneficial to the hospital. *Attorney-General* v. *Smith* (1).

Mr. *Baily*, in reply.

Dec. 22. SIR G. J. TURNER, L.J., after stating the pleadings in the case and referring to the proceedings in the former suit of *Attorney-General* v. *Clement* and the award of Sir *J. Trevor*, continued:—

Ever since the making of this award the hospital estates appear to have been let on leases for lives upon payment of fines on the dropping of each life, and the fines have been divided between the

(1) 2 Vern. 746.

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master, brethren, and sisters, as directed by the award. It would seem, indeed, from the statements contained in the information in *Attorney-General* v. *Clements*, that the practice in these respects was the same before the award was made. Some of the leases since the making of the award have been granted in pursuance of orders of this Court, and I shall presently refer to these orders, and the petitions on which they were founded. The only other facts which appear to me material to be stated are, that it appears from the evidence before us that the leases of the estates belonging to this hospital have for a great number of years been dealt with in the way of sale, purchase, settlement, and otherwise, as leases renewable perpetually upon payment of fines, and that some considerable part of the city of *Bath* has been built by, and at the expense of, the tenants of the hospital on the faith of their leases being so renewable, and that the improved value of the hospital estates, if now in hand, would be about £12,000 a year.

The questions which present themselves for our consideration upon the facts appearing in this case may, I think, conveniently be considered under three heads. First, whether it is in the power of this Court to alter the system of leasing the estates of this charity which has so long prevailed. Secondly, whether, assuming that the Court has power to make such alteration, it ought, under the circumstances of the case, to be made; and, thirdly, if the alteration ought to be made, in what mode it ought to be carried into effect.

In dealing with the first of these questions there are two prominent points to be considered. First, whether there is a right on the part of the tenants of the estates to have their leases renewed; and, secondly, whether the award made by Sir *John Trevor* precludes the Court from giving any relief in this suit which may affect the tenants' interests. As to the first point, it was not contended on the part of the lessees, the petitioners, that the mere fact of the leases having been continually renewed could of itself create a right in the tenants to insist upon the renewal of their leases; and in my opinion no such contention could successfully have been maintained. There are so many considerations which lead, or may lead, to the renewal of leases, that an obligation to renew cannot be inferred from the mere fact of renewal. To hold

that it could would be most dangerous to property, more especially in the west of *England*, where the habit of leasing for lives, and of renewing the leases on payment of fines, prevailed until lately to a great extent. The tenants, therefore, did not rest their case on this ground, but what was contended on their part was, that the instrument of foundation of this charity not being forthcoming, the existence of an obligation to renew ought to be inferred from the continued practice of renewal, supported as it was said to be by the frame and statements of the information in *Attorney-General* v. *Clement*, and by Sir *John Trevor's* award, and the proceedings in this Court which have been under it. This view of the case renders it necessary to consider the documents on which reliance is placed.

First, then, as to the information in *Attorney-General* v. *Clements*. This information purports to be filed at the relation of the master, brethren, and sisters on behalf of themselves and the tenants, and it states to the following effect [His Lordship read the principal allegations as stated above]:—It is upon the information purporting to be filed, as it was said, on the part of the tenants, and on the allegations of the information which I have read, that the tenants rely; but in estimating the weight which is due to the frame and allegations of this information, it must be borne in mind that the income of the master, and brethren, and sisters materially depended on the renewal of the leases, and that their interest therefore was identical with that of the tenants. This alone seems to me to be sufficient to account for their having represented themselves as acting on behalf of themselves and the tenants; and as to the allegations of the information, it is true that there are some loose allegations to the effect that the tenants were objects of the charity; but in what sense are they alleged to have been so? In the sense only that their leases were to be renewed on payment of moderate and reasonable fines, or, as is said in another part of the information, "that they were to have easy and good bargains;" and I think these allegations are far too loose to justify the inference that the tenants had any right of renewal on such terms as any court of justice could recognise. There is no allegation that they had a right to renewals at any certain rents, or on payment of any cer-

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tain fines, and we shall presently see that this was not the case. I think, therefore, that the frame and allegations of this information afford no support to the case of the tenants.

Then as to Sir *J. Trevor's* award, it was relied on as giving certainty to the fines and rents to be paid by the tenants; but in considering this award, it does not seem to me to recognize any pre-existing right on the part of the tenants to have their leases renewed, and, on the contrary, I think it goes far to negative the existence of any such pre-existing right. So far as respects the right to renewal on payment of one year's improved value, the 3rd clause of the award seems to me to negative it. By that clause Sir *J. Trevor* adopts the voluntary proposal of the tenants contained in the schedule to the award, and on turning to that schedule it will be seen that the fines proposed to be paid by the tenants far exceeded in most if not in all the cases one year's improved value, and it is, to say the least, most improbable that the tenants should have offered to pay such fines if they had any right to claim renewals upon payment of one year's rent; and so far as respects the right to renewals on payment of fair and reasonable fines, the award does not seem to me to recognize any such right as having previously existed. It does indeed fix the sums to be paid by the tenants for the renewal of their leases, and it may be assumed to have fixed those sums as being the sums fairly and reasonably payable for such renewals; but this is quite as consistent with the object or the necessity of continuing the system of leasing upon fines as it is with the existence of the alleged previous right; and, besides, it is to be observed that the 13th clause of the award provides that the new leases shall not exceed three lives at the most, a provision which is quite inconsistent with the notion that the lessees were entitled to the renewal of their leases for three lives absolutely. Upon the whole it seems to me that this award was no more than a scheme for the future administration of the charity; that Sir *J. Trevor*, thinking that the system of the renewal of the leases could not be put an end to without the objects of the charity being deprived of their incomes, fixed what he considered to be reasonable incomes for them, and inserted the provision that the rents and fines should not be increased without the leave of the Court, for the purpose of securing an efficient

control over any alteration which the then or future objects of the charity might attempt to make in their incomes. He probably foresaw that but for this security being provided they might increase the fines to the prejudice of their successors, or might increase the rents for their own benefit when the objects of the charity ought to be extended.

The remaining ground on which the tenants relied in support of their right to the renewal of their leases was the fact of this Court having acted as it did upon Sir *J. Trevor's* award; but it is clear that in all the proceedings in this Court subsequent to the award, and on which the tenants rely, the Court was acting upon the award, and not upon any original right in the tenants independently of the award. I do not think it necessary to enter into the details of these proceedings. I pass by the petition which the Court dismissed, and the bill which the Court also dismissed (1), thinking it possible that their dismissal may have proceeded on the ground that the proceedings were taken by under-tenants, and not the tenants. It is sufficient, so far as the question of the original right in the tenants is concerned, to say, that in none of the petitions on which orders were made by the Court is any such original right alleged to have existed, and to observe that, in some of the cases in which these orders were made the Court required larger fines to be paid than the tenants had offered to pay, and that the renewals of the leases were only granted upon the payment of such larger fines, which it cannot be supposed that the tenants would have submitted to pay if they had had any such original right as is now alleged to have existed. I do not think, therefore, that these proceedings assist the case of the tenants in the point of view I am now considering. Much reliance was placed, in the course of the argument before us, upon an observation reported to have fallen from Lord *Eldon* upon one of the petitions under the award being heard by him, "That if the award was to be disturbed, it must be disturbed by the House of Lords" (2); but this observation seems to me to have had reference to the difficulty of considering that the award could create a jurisdiction in the Court, to be exercised by petition, the difficulty which Lord

(1) *Somerville* v. *Chapman*, 1 Bro. C. C. 61.

(2) *Attorney-General* v. *Clement*, T. & R. 62.

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Eldon was then considering, and which he got over only by force of the precedents before him. The observation had not, I think, reference to any questions as to the binding character of the award. Indeed, confirmed as it was by the decree of the Court, I do not see how, so long as it remains unaltered, any doubt could be entertained on that point, whatever difficulty there might be in exercising jurisdiction under it.

This brings us to the second point—Ought this award now to be held binding upon the Court? I am of opinion that it ought not. It is, as I have said, no more than a scheme for the administration of the charity, and I know no authority and no principle which can warrant us in holding that a scheme settled by this Court for the administration of a charity cannot be altered, if the lapse of time and the change of circumstances render it for the interest of the charity that the alterations should be made. It is the duty of the Crown to protect the interest of charities, and to take the necessary proceedings for remedying any defect arising in the administration of them; and I can see no distinction between defects arising in the ordinary administration of charities, and those which may arise in the administration of them under schemes settled by this Court, except that in the cases in which discretion has been already exercised more care and caution ought perhaps to be exercised before alterations are made. I had occasion very much to consider this question in *The Attorney-General* v. *Bishop of Worcester* (1), and I abide by the opinion which I then expressed as to the power of the Court to alter schemes settled under its orders, and as to the circumstances under which that power ought to be exercised. My opinion therefore is, that it is in the power of this Court to alter the system of leasing the estates of this charity.

Ought, then, this alteration to be made under the circumstances of this case? I think it ought. It is in evidence before us that the annual value of this property if in hand would amount to about £12,000, and that under the present system the property does not produce more than sufficient to pay the annual sum of about £37 to each of the twelve poor brothers and sisters. A system producing such results cannot in my opinion properly be permitted to

(1) 9 Hare, 328.

continue. There remains then to be considered only the question in what mode this alteration ought to be carried into effect. The present objects of the charity have done no more than pursue the system adapted by their predecessors and authorized by the award, and no alteration ought I think to be made so as to prejudice their interests. Their average incomes must, I think, be continued to them, and to this the Attorney-General does not (as I understand) object. The decree and order which we are now to make ought therefore, I think, to provide for this being done. It is possible that, amongst the lessees of the estates of this charity, there may be some who may not have had sufficient enjoyment under their leases to recompense them for expenditure made by them upon the faith of their being entitled to the renewal of their leases, but the petitioners have certainly not satisfied me that this is the case so far as they are concerned; and as to any other of the lessees they will not, as I apprehend, be bound by any order made in their absence. It will, as I conceive, be competent to them, if they shall be so advised, to assert any equity which they may think fit to claim upon this or any other ground.

I think, therefore, that no provision is necessary to be made in this respect, and that the proper decree and order now to be made is—To dismiss the petitions, but without costs. To make the declaration prayed by the information, and to order a scheme to be settled, having regard to this declaration. To continue the injunction, and the order for the *interim* maintenance of the objects of the charity. But as it may be found to be necessary or proper, in order to carry this decree into effect, that some of the leases should be renewed, I think it should be added to the decree and order, that neither the declaration nor the injunction should extend to prevent any renewal which may be found to be necessary or proper for this purpose, and that, in acting on this provision, regard is in the first instance to be had to the cases of lessees, other than the petitioners, who may have expended money upon the charity estates upon the faith of their leases being renewable, and may not have had sufficient enjoyment under their leases to recompense them for the money so expended.

The LORD JUSTICE KNIGHT BRUCE concurred.

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Pleading—Demurrer—Cross Bill—Res Judicata.

Demurrer will lie to a bill, though called a cross bill, if it is not really a cross bill.

Demurrer will not lie to a bill on the ground of *res judicata*, unless it avers that everything in controversy as the foundation of relief was also in controversy in the former suit.

Order of STUART, V.C., overruling demurrer affirmed.

DEMURRER. This bill was filed by *W. M. Moss* against *The Anglo-Egyptian Navigation Company Limited, Frederick Chapple, J. J. Bibby, F. R. Leyland, J. T. Cross, J. Cater,* and *J. W. Larking,* and contained the following statements:—

That the Plaintiff was a shipowner, and had for several years carried on the business of a shipowner under the style of *James Moss & Co.,* and was engaged in carrying passengers and merchandise by steamers from *Liverpool* to *Egypt* and the *East,* and was ships' husband to several of the steamers engaged in the trade, and owner of shares in them. That the Defendant *Chapple,* and the Defendants *Bibby* and *Leyland,* the last two trading under the firm of *Bibby & Co.,* and the Defendant *Cross,* were engaged in the same trade in opposition to the Plaintiff. That in order to put a stop to the opposition, an agreement was made on the 25th of June, 1861, between the Plaintiff and the Defendants *Bibby, Leyland, Chapple,* and *Cross,* called the Italian Agreement, whereby they agreed not to compete in the outward steam trade to *Malta, Syria,* and *Egypt,* for five years; that *Bibby & Co.* should act as ships' husbands, and made many other stipulations as to the mode of carrying on the trade. That the Plaintiff and the Defendants *Bibby, Leyland,* and *Cross,* performed their parts of the stipulations contained in the Italian Agreement. That on the 13th of November, *Chapple* sent to the Plaintiff's firm a letter as follows:—

"GENTLEMEN,—I think it right to inform you that it is my in-

tention, immediately, to employ a steamship in the *Egyptian* trade outwards from *Liverpool*. The loss of the *Pactolus* entitled me to do this, and by it I shall endeavour, to some extent, to make good the injury that loss would otherwise cause me, and to reduce the damages I shall at the proper time have to demand of you on account of my interest in the ship lost through your breach of our agreement."

That, in 1863, *Chapple* sent steamers to *Malta*, *Egypt*, and *Syria*, and made large profits thereby, and that such employment of steamers was in breach of the Italian Agreement. That *Chapple* alleged that he was released from the agreement by reason of breaches of the same agreement by the Plaintiff. That, in 1863, the Plaintiff filed a bill of complaint in this Court against *Chapple*, *Bibby*, *Leyland*, and *Cross*, and such bill *stated the aforesaid facts*, and prayed an injunction against *Chapple*, to restrain him from employing any steamship or vessel in the trade outwards from *Liverpool* to *Malta*, *Egypt*, or *Syria*, and from competing in any manner, either directly or indirectly, in such last-mentioned trade, and otherwise from violating the said Italian Agreement, and that if necessary, such agreement might be decreed to be specifically performed, or for damages for the breach thereof, and for further relief. That the Defendant *Chapple* duly appeared to the said bill, and opposed the relief thereby sought. That the cause came on to be heard before the Master of the Rolls, and on the 8th of December, 1864, was dismissed with costs against *Chapple*, and without costs against the other Defendants. That the decree was enrolled, and the Plaintiff had appealed to the House of Lords against the decree. That in September, 1864, and after the evidence in *Moss* v. *Chapple* was closed, *Chapple* filed a bill, in a suit called *Chapple* v. *Bibby*, against *Bibby*, *Moss*, and others, charging that there were errors in the accounts furnished, and that commission had been improperly charged by *Bibby & Co.*; and praying an account against them, and that they might be removed from being ships' husbands. That the existence of the suit of *Chapple* v. *Bibby* was not and could not be put in evidence in the suit of *Moss* v. *Chapple*. That the Defendants, the *Company* and *Chapple*, pretended that the Italian Agreement was invalid; but the Plaintiff charged

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the contrary, and that the suit of *Chapple* v. *Bibby* was pending, and was founded on that agreement, and that *Chapple* intended to prosecute it. That if *Chapple* had ever any ground for disputing the validity of the Italian Agreement, he became bound by it by filing the bill in *Chapple* v. *Bibby*. That *Chapple* recently concerted with *Cater*, *Larking*, and others to form the *Anglo-Egyptian Navigation Company*, to carry on the same trade. And the bill prayed that, if necessary, this bill *might be taken as a cross bill* to the suit of *Chapple* v. *Bibby*, and that the Defendants, the *Company* and *Chapple*, might be restrained from employing any steamship in the trade outwards from *Liverpool* to *Malta*, *Egypt*, or *Syria*; and that, if necessary, the Italian Agreement might be decreed to be specifically performed; and that the Defendants might be decreed to make compensation for damage; and that, if necessary, this suit might be taken as supplemental to the suit of *Moss* v. *Chapple*, and that the Plaintiff might have discovery from the Defendants, *Cater* and *Larking*, and relief and discovery from the other Defendants.

To this bill the Defendants, the *Company* and *Chapple*, put in separate general demurrers for want of equity.

The demurrer of *Chapple* was heard before Vice-Chancellor *Stuart*, who overruled it; and the *Company's* demurrer was also overruled.

The Defendants both appealed.

The Attorney-General (Sir *R. Palmer*), Mr. *Malins*, Q.C., and Mr. *Surrage*, for the Defendant *Chapple*:—

This bill is, in fact, a bill of review filed without leave, for it is on precisely the same ground, and asks the same relief as the bill in *Moss* v. *Chapple*, which has been dismissed; *Mitf. Pl.* (1); *Bainbrigge* v. *Baddeley* (2). It is not really a cross bill either, though called so. It is apparent, on the face of the bill, that the subject matter is *res judicata*.

Mr. *W. M. James*, Q.C., and Mr. *J. Pearson*, for the company:—

If the bill is a defence to *Chapple's* claim, and so a cross bill,

(1) 4th ed. 91. (2) 2 Ph. 705.

that cannot enable the Plaintiff to make the company a party. You cannot have a supplemental bill against new Defendants upon the speculation that the Plaintiff may succeed in his appeal to the House of Lords.

Sir *H. Cairns*, Q.C., and Mr. *Kay*, in support of the bill:—

As far as regards *Chapple*, it is a cross bill and cannot be demurred to for want of equity; but must wait till the hearing of both suits; *Mitf. Pl.* (1). As to both Defendants, the bill raises issues of law and of fact, which were not and could not be determined in the former suit. Suppose that the bill had not stated the proceedings in the former suit, would it be an answer to plead that there had been a former bill? This bill applied to a different state of circumstances, for breaches of the agreement have happened whilst the former suit was in existence, such as the institution of the other suit and of the company. Such a suit cannot be met by a plea of *res judicata; Toulmin* v. *Copland* (2); *Hunter* v. *Stewart* (3).

The Attorney-General, in reply:—

What Lord *Redesdale* means is, that a cross bill requires no equity, and need ask for no relief; but it must be a real cross bill, otherwise, any unscrupulous Plaintiff, by calling his bill a cross bill, might make it impossible to demur. The Plaintiff says, first, this is not a bill *ad idem;* and, secondly, that it contains allegations of facts which have occurred since the first bill was filed. The intendment is against the pleader, and he has not averred that the former bill was not for the same matter as this bill; on the contrary, he avers that everything pleaded in the former suit was true, and he founds his claim to relief on the same matter, and he must be taken to have proved it in the former suit. The subsequent matter alleged is only as to the filing of the bill in *Chapple* v. *Bibby*, and of the formation of the company, and their intention to use these steamers in the *Levant* trade. The issue raised in both suits is the same. Mr. *Chapple* says he has a right to depart from the agreement, and means to do so; and Mr. *Moss* denies that right. There is no question of facts.

(1) 4th ed. p. 263. (2) 2 Ph. 711. (3) 10 W. R. 176.

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As to the cases, the second bill in *Toulmin* v. *Copland* (U. S.), was quite different from the first; so also in *Hunter* v. *Stewart* (U. S.).

Mr. *James*, for the company, in reply.

As to the company not being able to avail itself of the defence of *res judicata*, not having been a party to the former suit, if it is *res judicata* as to *Chapple*, the suit fails as to the company also. The bill is multifarious if it is a cross bill as to *Chapple*, and an original bill as to the company. If the Plaintiff says that it is not *res judicata*, because he did not adduce all his evidence, then it is a clear bill of review.

The Lord Chancellor, at the conclusion of the replies, expressed his opinion that the demurrers ought to have been allowed. If the bill was to be treated as a bill of review, of course it was demurrable; because there had been no permission given to file such a bill, as there should have been if the facts were newly come to the knowledge of the parties; but his Lordship did not look at it in that point of view; for the real questions were, first, whether this could be treated as a cross bill, and if it could be so treated, whether the demurrer was therefore bad; and if it could not be treated as a cross bill, whether the demurrer could be sustained upon the ground that it was only a re-opening or an endeavouring to re-open that which has been already adjudicated upon.

Upon the subject of a cross bill, there were, undoubtedly, authorities quoted which said that you could not demur to a cross bill; that a cross bill is a defence which must come on at the same time as the original bill, and be disposed of as if it were a sort of adjunct to the answer to be taken into consideration with the original bill. That, to a certain extent no doubt, was accurately stated; but then it must be a real cross bill; it would not do merely to say the bill was a cross bill, and therefore could not be demurred to; otherwise a bill might be filed for the specific performance of a sale of an estate with an allegation that it was to be treated as a cross bill to something else totally different. It must be a bill in its nature a cross bill. Then was this a cross bill? It did not appear to his Lordship that anything decided on this bill could be

of the least assistance to anything to be decided upon the bill to which it was said to be a cross bill.

Then as to the pleadings. The suit of *Moss* v. *Chapple* came on to be heard before the Master of the Rolls, and was dismissed with costs against some of the parties, and without costs as to others. His Lordship then expressed his opinion, that if upon the allegations in this bill there could be no doubt that the bill in *Moss* v. *Chapple* was dismissed for want of equity, on the ground that there was no valid agreement between the parties in restraint of the trading, this bill must be demurrable, and added that he thought the averments did go to that extent.

In the course of the next day, his Lordship expressed doubts whether the view taken by him at the close of the argument was correct, and gave leave to the counsel for the Defendants to offer further arguments on the question. This offer was declined by the *Attorney-General* for the Defendants, who left the matter to be decided as it stood.

Dec. 9. Lord Cranworth, L.C. :—

In this case the Plaintiff is a *Liverpool* merchant, trading to the *Levant;* the Defendant, Mr. *Chapple,* is also a *Liverpool* merchant, trading to the *Levant.* The other Defendants, for whom Mr. *James* appears, are a company that has been formed, deriving title under Mr. *Chapple.* The Plaintiff was in the habit of sending goods to the *Levant* almost entirely in ships belonging to a *Liverpool* firm of *Bibby & Company.* It appears that there was, previously to the year 1861, a great opposition between the *Liverpool* merchants in this trade to the *Mediterranean.* Several firms were engaged besides those I have mentioned, and they felt that it would be to their interest to stop this opposition if possible; and with that view all or most of them became part owners of all or most of the ships engaged in the trade. I presume that was done with the view of giving validity, or with a hope of giving validity to an arrangement about the trade which might be otherwise void with reference to the law with respect to the restraints

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upon trade. I do not know whether that was the reason; but that possibly might be the reason. In point of fact, most of the firms, or all of the firms became interested in all, or the greater number of the ships which were engaged in this trade. That being so, on the 25th of June, 1861, the agreement was entered into which gives rise to the present question, and which is called the Italian Agreement, the effect of which was that Mr. *Chapple* and Mr. *Cross* were not to compete with the Plaintiff, Mr. *Moss*, in the outward trade to *Malta*, *Syria*, and *Egypt*. In 1863, Mr. *Chapple* contended that circumstances had occurred releasing him from this agreement, and on the 13th of November, 1863, he gave formal notice to the Plaintiff that he intended to trade to the *Levant*, *non obstante* the agreement, and he thenceforth did so. Mr. *Moss*, the Plaintiff, thereupon filed his bill against Mr. *Chapple* and others, praying an injunction to restrain him from competing in the *Levant* trade, as being a course of conduct contrary to his agreement. That cause was heard at the Rolls, on the 8th of December, 1864, and the bill was then dismissed with costs against Mr. *Chapple*, and that dismissal has been enrolled, with a view, as I understand it, to an appeal to the House of Lords. The present bill was filed on the 13th of April, 1865, by Mr. *Moss* against Mr. *Chapple* and others, praying against them the very same relief, exactly as in the former suit, and to this bill there was a general demurrer on the ground of the former decree.

Now there is no doubt that a question once adjudicated upon cannot be again brought in question except by a bill of review in the same Court, or by appeal to a higher Court. At the hearing before me when this case was argued some two or three weeks ago, I thought that principle would warrant the demurrer, but further consideration has satisfied me that I was wrong. If the decree *must* have proceeded on the ground that there was no right to restrain the Defendant, then the demurrer was good. But that is not so; it might have proceeded upon a want of proof of some material fact in the case. The test will be to see how it would have been if the former suit and decree had not been stated on the face of this bill but had been pleaded. It would not have been sufficient in such a case to plead the former suit and the decree of dismissal, it would have been necessary to couple

with that an averment of facts sufficient to show that the question raised in the second suit had been adjudicated upon in the first. That is not only conformable to principle, but to authority, and it was the occurring of that to my mind when I left the Court that led me to see that I had come to an erroneous conclusion. This is not, it must be understood, a technical rule at all, but it is one of substance, and unless it is strictly adhered to, Plaintiffs who have a clear title to relief on account of the breach of an agreement, may, by failing to prove a breach, lose all right to complain of future breaches; as, for instance in this case, if the Plaintiff failed to prove the trading or intention to trade to the *Levant*, as was suggested by Sir *Hugh Cairns*. In short, I confess that the impression on my mind was, that there was not only an averment that all these matters were true which were stated in the former suit, which of course is so, so far as there is a re-averment of them, but also an averment that they had been established, which is something more than an averment of their truth. If there had been an averment that all these facts averred in the bill were true, and also that they had been averred in the former suit and proved, then I am inclined to think the demurrer would have been good. But I could not find, upon looking at all the authorities to which I had recourse, an instance of a demurrer to a bill upon such a ground as a former dismissal. I take it to be so for this reason, that it never can happen without averments, which are not likely to be introduced, that everything that was in controversy in the second suit as the foundation for the relief sought was also in controversy in the first. That is a very clear principle, and upon that principle I think the demurrer must be overruled.

I will just call attention to one very imperfect authority on the subject, the case of *Brandlyn* v. *Ord* (1), which is reported very shortly. With regard to the substance of the case, that is immaterial; but Lord *Hardwicke* laid it down as a rule, "that where the Defendants plead a former suit, that the Court implied that there was no title, when they dismissed the bill, is not sufficient, they must shew it was *res judicata*, an absolute determination in the Court that the Plaintiff had no title." That is very awkwardly worded, but the meaning of it is, that in pleading a former suit as

(1) 1 Atk. 571.

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a bar, it is not sufficient to shew that the bill was dismissed, but you must plead, further, that which will shew that the same matter in dispute in the subsequent suit was *res judicata* in the first. The same thing was determined in *Peterborough* v. *Germaine* (1). That is a very complicated case, and the facts are very difficult to be collected; but the result was this, that the question whether the decree in a former suit was properly pleaded in bar to the relief sought in the second suit depended, in the opinion of the House of Lords, upon whether or not it appeared upon the plea that the same matters that were in dispute in the new suit had also been adjudicated upon in the first suit, and they desired one counsel on each side to argue that single question, and then the entry in the journal of the House is that, that having been done, the House was of opinion that the two matters were the same, and that what had been adjudicated upon in the first suit was completely the same as that which was sought to be adjudicated upon in the second, and thereupon they allowed the plea. Under those circumstances, I think I am bound to say, that this does not appear upon the face of this bill, and therefore the demurrers must be overruled, and must be overruled with costs.

His Lordship said, in answer to a question by the *Attorney-General*, that he adhered to what he had said as to a demurrer to a cross bill.

(1) 6 Bro. P. C. 1.

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Specific Performance—Repairs—Railway—Award—Practice.

By an award made in June, 1863, under a reference at *nisi prius*, the arbitrator awarded that the Defendant should execute to the Plaintiff a lease of the right to use such part of a certain railway made by the Plaintiff as was upon the land of the Defendant, the lease to be in the words set out in the award; and that the Defendant should have a right of running carriages over the whole line on certain terms, and might require the Plaintiff to supply engine-power, while the Plaintiff should have an engine on the railway; and that the Plaintiff should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to the Defendant. The Plaintiff applied at law to set aside the award, and ultimately in April, 1864, the application was refused. In July, 1864, the Plaintiff filed his bill for specific performance of the award:—

Held, reversing the decree of Sir *W. Page Wood*, V.C., that specific performance could not be decreed, inasmuch as the provisions in favour of the Defendant could not be enforced at once, but gave the Defendant a right to have certain duties continuously performed by the Plaintiff for a number of years, and the Court could not undertake to see to such performance.

Semble, that even if the award had been one of which specific performance could have been decreed, the Plaintiff could not, after taking proceedings to set it aside, have enforced specific performance.

The Defendant appealed from an order overruling a demurrer, and from the whole of the decree made at the hearing:—

Held, that the Plaintiff was entitled to begin.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Wood*, and from an order overruling a demurrer to the bill.

The Plaintiff was the owner of a colliery called *Wylam Colliery*, which had communication with the river *Tyne* by means of a railway, about five miles long, from *Wylam* to *Lemington*, made by the ancestors of the Plaintiff, under a private arrangement with six persons, over whose lands, as well as those of the Plaintiff, it ran. Such way-leave rents as were from time to time agreed upon, were paid to the six landowners. The Defendant was one of the persons over whose land the railway ran, and had for some time used the railway throughout its whole length, on terms from time to time agreed upon between him and the Plaintiff.

Disputes having arisen between them, the Plaintiff brought an

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action to recover what he claimed to be due from the Defendant for the use of the railway, and by an order at *nisi prius* on the 26th of February, 1863, all matters in dispute between the parties were referred to arbitration.

On the 6th of June, 1863, the arbitrator made his award, containing provisions, of which the short effect was as follows:—He awarded that the Defendant should pay to the Plaintiff a certain sum, and should, within twenty-one days, execute and deliver to the Plaintiff a lease, in the form and words set out in the schedule. He further awarded that, in addition, and without prejudice, to the exceptions and reservations in favour of the Defendant contained in the lease, the Defendant, his heirs, and assigns, and his and their lessees, &c., should have, as from the 31st of March then last, and thenceforth during the continuance of the lease, full power of passing and repassing with waggons, &c., for the purposes therein mentioned, along not only so much of the railway as was upon the Defendant's land, but upon so much as passed over the lands of any other persons from whom the Defendant could obtain a right of way leave, and over the lands of the Plaintiff. He further awarded that the Defendant, his heirs, or assigns, &c., might require the Plaintiff, his heirs, &c., to supply engine power for drawing the Defendant's waggons over the railway, if, and during such time or times as, the Plaintiff, his heirs, &c., should keep an engine or engines for use on the railway. He further awarded that the Defendant, his heirs, &c., should pay to the Plaintiff, his heirs, &c., remuneration for the above privileges at the rates therein mentioned, being $\frac{1}{2}d.$ per ton per mile for the use of the railway, the like additional rate for way-leave over so much of the railway as lay on the lands of the Plaintiff, and $2d.$ per ton per mile for haulage. He further awarded that the Defendant, his heirs, &c., should keep full, detailed, and accurate accounts of all leadings over the railway under the above powers, containing such particulars as therein mentioned, and deliver a monthly account to the Plaintiff, his executors, administrators, and assigns, and permit the Plaintiff, his executors, administrators, and assigns, to have access to the accounts kept as above. He also awarded that the Defendant, his executors, administrators, &c., might stop any waggons for the purpose of weighing, causing as little hindrance as

might be to the traffic. He also awarded that the Plaintiff, his executors, administrators, and assigns, should, during the continuance of the lease, keep the railway between *Wylam* and *Lemington* (*i. e.*, the whole line) in good repair and condition, for the use and exercise of the liberties and privileges thereby awarded.

The schedule to the award contained the form of the lease at full length, by which the Defendant purported to demise to the Plaintiff, for twenty-one years, a way-leave over so much of the railway as lay on the Defendant's land. It is unnecessary to give any particulars of this lease, it being sufficient to say that it contained reservations to the Defendant of divers privileges over that part of the line which lay on his own land, but did not purport to provide in any manner for the privileges awarded to the Defendant in re-respect of those parts of the line which were not situate on his property.

On the 27th of June, 1863, the Defendant's solicitors tendered to the Plaintiff a lease executed by the Defendant, and requested the Plaintiff to execute a counterpart. The Plaintiff did not accept the lease or execute a counterpart.

On the 29th of June the Defendant served the Plaintiff with a notice to quit. On the 24th of November, 1863, the Plaintiff obtained a rule *nisi* from the Court of Exchequer to set aside the award. On the 28th of April, 1864, this rule was after argument discharged.

On the 2nd of May, 1864, the Plaintiff's solicitors wrote to the Defendant's solicitors, stating the Plaintiff's readiness to accept the lease and execute a counterpart. The Defendant, on the 6th, refused to grant the lease. The Plaintiff, on the 13th of July, 1864, filed his bill for the specific performance of the award. On the 13th of January, 1865, a general demurrer for want of equity was overruled by Vice-Chancellor *Wood* (1). The cause was then set down upon motion for decree, and on the 10th of May a decree was made, the material parts of which were as follows:—

"Order that the Defendant do specifically perform the award in the pleadings mentioned on his part, and that he do for that purpose execute to the Plaintiff a lease in the words and figures in the schedule to the said award contained, such lease to bear date the

(1) 2 H. & M. 270.

(1) See 11 Jur. N.S. 500: 13 W.R. 736.

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27th day of June, 1863, being the day on which the Defendant signed and sealed, as an escrow, the indenture in the answer mentioned, and order that in any proceedings at law or otherwise, in respect of such lease or any of the provisions thereof, neither the Plaintiff nor the Defendant, nor any person or persons claiming under them respectively, be at liberty to dispute the date of such lease.

"Order that the Plaintiff do execute and deliver to the Defendant a counterpart of such lease; and the Plaintiff and Defendant, and all persons claiming under them respectively, are to admit that such lease was executed on the day on which it bears date.

"Declare that the Defendant, his heirs and assigns, are entitled as from and after the 31st day of March, 1863, being the date in the said award in that behalf mentioned, and during the continuance of such lease, to the full enjoyment of the full power and liberty of passing and repassing with all or any waggons, trucks, or other carriages whatsoever, laden or unladen, and drawn or propelled by horses or steam, or other engines of present use, or future invention, over the lands in the said award mentioned, and for the purposes and subject to the provisions and restrictions in the said award also mentioned.

"Declare that the Defendant, his heirs, and assigns, or his or their grantees, lessees, or tenants, are also entitled during the continuance of the said lease, and during such time or times as the lessee (Plaintiff), his heirs, executors, administrators, or assigns, shall keep an engine, or engines, for use on the said waggon-way, but not otherwise, to require the lessee (Plaintiff), his heirs, executors, administrators, or assigns, to supply engine power for all or any such leadings as in the said award in that behalf mentioned, the lessor (Defendant), his heirs, and assigns, and his and their grantees, lessees, and tenants, paying unto the lessee (Plaintiff), his heirs, executors, administrators, or assigns, remuneration for the aforesaid privileges, in manner, and to the amount, provided in that behalf in the said award, and also keeping such full detailed and correct accounts as in the said award in that behalf mentioned, and stating and delivering, or causing to be stated and delivered, to the lessee (Plaintiff), his executors, administrators, or assigns, or his or their agent, or agents, a true copy of such accounts, in the

manner in the said award mentioned, and permitting the lessee (Plaintiff), his executors, administrators, and assigns, or his or their agents, to have such access to, and power of making extracts or copies from or of the same, as in the said award mentioned.

"Order, that an injunction be awarded to restrain the Plaintiff, his servants and agents, and all persons claiming under him by virtue of the said lease, until further order, from in any way, hindering or interfering with the Defendant, or those claiming under him, from or in respect of the full enjoyment of all such rights and privileges as aforesaid. But such injunction is not to prevent the Plaintiff, or those claiming under him, from stopping any waggons, trucks, or other carriages used by the Defendant, or those claiming under him, in the exercise of such privileges as aforesaid, and weighing the same and the contents, causing thereby as little hinderance or interruption as reasonably may be, in or to the use, exercise, or enjoyment of the said powers and privileges, or any of them.

"Declare that the Plaintiff, and those claiming under him, are bound during the continuance of the said lease, to keep the waggon-way between *Wylam* and *Lemington* in good repair and condition, for the use and exercise by the Defendant, and those claiming under him, of the liberties and privileges aforesaid. And any of the parties are to be at liberty to apply in respect of such repair as they may be advised."

The Defendant now appealed from the whole of this decree, and also from the order overruling the demurrer. A question was raised whether the Appellant or the Plaintiff should open the case. The LORD CHANCELLOR ruled that the Plaintiff should begin.

Mr. *Willcock*, Q.C., and Mr. *Faber*, in support of the orders appealed from:—

It was urged below, that because this reference was made a rule of the Court of Exchequer, the Court of Chancery had no jurisdiction; and the *Common Law Procedure Act* (17 & 18 Vict. c. 125, s. 17), was relied on. The authorities are decisive in favour of the jurisdiction, *Wood* v. *Griffith* (1), *Hawksworth* v. *Brammall* (2), *Nickels* v. *Hancock* (3). Then as to what is to be done by the

(1) 1 Sw. 43. (2) 5 M. & C. 281. (3) 7 De G. M. & G. 300, 317.

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Plaintiff, the Court has jurisdiction to decree the performance by a party of works on his own land, *Storer* v. *Great Western Railway Company* (1), *Sanderson* v. *Cockermouth, &c., Railway Company* (2), *Lytton* v. *Great Northern Railway Company* (3). *Ogden* v. *Fossick* (4), which was cited against us, is distinguished by the Vice-Chancellor (5) from a case like the present. *Gervais* v. *Edwards* (6) is a case depending on special circumstances. The Defendant here is insisting on retaining the benefits given to him by the award, while refusing to perform his part of it.

Mr. *Rolt*, Q.C., and Mr. *Batten*, for the Appellant:—

The question is whether the principle acted on by Vice-Chancellor *Wood* in *Ogden* v. *Fossick*, or that acted on by the Lords Justices in the same case is to be followed. Whether, if the Court had legislative power, it would be desirable to make parties perform in specie all manner of contracts, is not now the question. The Court only decrees specific performance where it can dispose of the matter by an order capable of being enforced at once, it does not decree a party to perform a continuous duty extending over a number of years, but leaves the opposite party to his remedy at law. *Gervais* v. *Edwards* (6); *Hills* v. *Croll* (7). No case has gone the length of the present. *Storer* v. *Great Western Railway Company* (8) goes further than the Court is in the habit of doing; but what was ordered there was the performance of a definite work to be performed once for all. In *Sanderson* v. *Cockermouth, &c., Railway Company* (9) the Master of the Rolls felt great difficulty, though that case did not involve the performance of a series of acts extending over twenty-one years, but something which could be done once for all and within a short period. If the award, instead of directing the Plaintiff to do the acts in question, had provided that the lease should contain covenants by him to do them, the case would have stood on an entirely different footing; for the Court could then have disposed of the whole matter by decreeing

(1) 2 Y. & C. C. C. 48.
(2) 11 Beav. 497; 2 H. & T. 327.
(3) 2 K. & J. 394.
(4) 11 W. R. 128.
(5) 2 H. & M. 280.
(6) 2 D. & War. 80.
(7) 2 Phill. 60.
(8) 2 Y. & C. C. C. 48
(9) 11 Beav. 497.

the execution of the lease. The case therefore is one in which the Court cannot decree performance of what the Plaintiff is bound to do. And as the award cannot be decreed to be performed *in toto*, no decree at all will be made; *Nickels* v. *Hancock* (1). *Ogden* v. *Fossick* (2), governs the present case. But for that decision no doubt the Vice-Chancellor would have directed specific performance by the Plaintiff of what he was bound to do. As it is, he has attempted to do so in an indirect way. It is contrary to principle to grant an injunction against a party when the opposite party does not allege that he is doing or intending to do anything in breach of his obligations. An undertaking would have been more correct in point of form, but still the substantial difficulty would remain, that the Court would be engaging to compel the Plaintiff to do certain positive acts continuously for twenty-one years. Mandatory injunctions are very sparingly granted. *Blakemore* v. *Glamorganshire Canal Company* (3). Then as to keeping the railway in repair, if a decree in this form is to be maintained, there is no reason why a decree should not be made to compel a contractor to make a railway. Apart from all these grounds, we say that the Plaintiff's conduct disentitles him to relief. The Court requires parties seeking specific performance to be prompt, especially as to trading property. Here there not only was a delay of more than twelve months, but an active refusal by the Plaintiff to perform the award. He elected to take his chance at law, he proceeded at law to set the award aside, and cannot now be allowed to turn round and seek specific performance, but must be left to law. That the Defendant opposed its being set aside is no objection to this view. The Defendant considered that the Plaintiff had broken it by refusing to accept the lease, and that he, the Defendant, was entitled to damages for the breach. He therefore opposed its being set aside, but that is no admission that it ought to be enforced in equity. The Defendant was willing to abide by it. The Plaintiff's refusal to submit to it has obliged the Defendant to alter all his arrangements as to the transit of goods, and it would be in the highest degree inequitable to enforce it against him now.

(1) 7 De. G. M. & G. 300, 327. (2) 11 W. R. 128, L. J.
(3) 1 M. & K. 154, 183.

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Mr. *Willcock*, in reply:—

None of the acts to be done by the parties are such as to make a decree impossible. As to keeping accounts, that is a stipulation for the benefit of the Plaintiff, and he can waive it. As to the Plaintiff's finding engine power, a negative injunction fully meets the case; there being no positive act to be done by the Plaintiff, he is only not to interfere with the Defendant's using the engine he finds there. As to repairs, it is common form in a lease to have a covenant to repair. *Nickels* v. *Hancock* turned upon hardship and excess of authority, not on any doctrine applicable to the present case. *Ogden* v. *Fossick* turned on special grounds, making a covenant in the lease improper for effecting the object.

Dec. 21. LORD CRANWORTH, L.C., after stating the facts, continued:—

The rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason—that the Court does not grant specific performance unless it can give full relief to both parties. Here the Plaintiff gets at once what he seeks—the lease; but the Defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the Plaintiff of daily duties during the whole term of the lease. The Court has no means of enforcing the performance of these duties, all it can do is to punish the Plaintiff by imprisonment or fine, if he does not perform them. The form of the decree itself shews the want of jurisdiction. It does not, and it could not, decree a specific performance by the Plaintiff of that part of the award which gives the Defendant the way-leave over the whole line, and a right to have engine power supplied by the Plaintiff, it only declares the rights of the Defendant, and then awards an injunction against the Plaintiff, restraining him from failing to do what he is bound to do. This appears to me to be perfectly novel. If the question had merely been as to a matter of form I should have endeavoured to get over the difficulty, but

it appears to me that an undertaking by the Plaintiff to the same effect would be equally objectionable, for in either case the Court might be called upon for a number of years to issue repeated attachments against the Plaintiff for his default in performing what he had agreed to do. The same observations apply to so much of the decree as relates to keeping the railway in repair. No attempt is made to decree specific performance, but a declaration is made of the obligation of the Plaintiff, and liberty to apply is given in case of this obligation not being performed. This appears to me to be assuming a jurisdiction which only belongs to Courts of Common Law, of interfering when a party has violated a legal obligation; I am of opinion, therefore, that the decree ought to be reversed.

I should have come to the above conclusion even if there had been no authority precisely in point, but there is abundance of authority. In *Gervais* v. *Edwards* (1), where the dispute arose upon an arrangement between the proprietors of lands on the opposite banks of a river, as to future injury which might be done by the water, Lord *St. Leonards* refused to give any relief because no present decree could be made. The same principle is clearly laid down in *Hills* v. *Croll* (2), and in other cases to which it is unnecessary to refer. In order that the Court may interfere, there must be mutual rights capable of being enforced by the Court. Now, here, if the Defendant had been willing to perform the award, and the Plaintiff unwilling, could the Defendant have filed a bill for specific performance of the agreement to keep the road in repair, or to supply engine-power? It is clear that such a bill could not be maintained. This disposes of the case, there being no mutuality.

If the arbitrator, instead of awarding that the Plaintiff should do certain acts, had awarded that the lease to be executed should contain covenants by the Plaintiff to do them, the case would have stood on an entirely different footing. The Court would not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to decree the execution of a lease containing certain covenants, a kind of relief which is

(1) 2 D. & War. 80. (2) 2 Ph. 60.

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clearly within the jurisdiction of the Court, and open to no objection.

I am further disposed to think that, even if the case had been of such a nature that specific performance could have been decreed, the Plaintiff's title to relief would have been barred by his conduct. The award was made in June, 1863, and the present bill was not filed until July, 1864. It is true that the intermediate period was filled up by legal proceedings, which the Plaintiff says that he could not expedite. But they were proceedings in which the Plaintiff was endeavouring to set aside the award. It is a strong thing to say that, after a party has denied the validity of an agreement, and taken proceedings to set it aside, he can, when the result of those proceedings has proved adverse, turn round and insist on specific performance. I do not, however, decide the case on this ground, but on the ground that the award contains provisions which cannot, according to the course of the Court, be made the subject of a decree for specific performance.

L. C. 1865 Dec. 13.

In re DREW'S ESTATE.

Practice—Land Transfer Act (25 & 26 *Vict. c.* 53).

The judge must hear an application for an order to the Registrar of Title, though made in the first instance *ex parte*.

THIS was an application under the *Land Transfer Act*, 1862, asking that the Registrar of Title might be ordered to place upon the register a notice of a charge on real estate.

Mr. *Fry*, on making the application, said that he had made it under section 6 of the Act, before the Master of the Rolls, who refused to hear it on a mere *ex parte* application, and wished to have some one to appear and argue the case on the other side; he referred to *Re Kennard* (1).

The LORD CHANCELLOR said that the course directed in that case must be followed, and a statement prepared, and he thought

(1) 11 Jur. (N. S.) 27.

that the Master of the Rolls must then hear and decide the question. Perhaps it would be found necessary to serve some one with notice, on which matter the Master of the Rolls would give the proper directions.

L. C. 1865 DREW'S ESTATE.

In re LASCELLES.

L. C. 1865 *Dec.* 20.

Bankruptcy appeal—Practice—Evidence.

On an appeal in Bankruptcy no evidence which was not before the Commissioner can be used without leave, except to shew what took place at the hearing before him.

THIS was an appeal from an order of the Commissioner, who had allowed the joint creditors of an alleged partnership to vote in the choice of assignees.

The appellants had, since the hearing before the Commissioner, filed an affidavit of what had taken place before him, and also other affidavits as to facts tending to shew that the partnership had been dissolved. The respondents had protested against these affidavits being received, and had filed affidavits in answer under that protest.

Mr. *Bacon*, Q.C., and Mr. *Swanston*, for the appellants, proposed to read the other affidavits filed by them.

Mr. *W. M. James*, Q.C., and Mr. *Little*, for the respondents, objected to the introduction of new evidence without leave, except a statement of what took place before the Commissioner; *Ex parte Page* (1).

Mr. *Bacon* said that the proceedings before the Commissioner could not be understood without the other affidavits.

The LORD CHANCELLOR refused to allow the other affidavits to be read. All he had to do was to decide whether the Commissioner was right or wrong on the materials before him.

The appellants not being able to prove the dissolution of the partnership without this evidence, the appeal was dismissed.

(1) 9 Jur. (N. S.) 8. See 32 G. O. 1861.

L. C.
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Dec. 20.

3 Ch 578
Ch 579.

In re COLEMERE.

Act of Bankruptcy—Fraudulent Assignment.

An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts.

In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors.

Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent.

THIS was an appeal from an order made by Mr. *Sanders*, the Commissioner of the Birmingham District, affirming an adjudication of bankruptcy against *Ann Colemere*.

There was some controversy as to the facts of the case, and witnesses were examined before the Commissioner, and their evidence was read to the Court on this Appeal. The following facts seem, however, to have been established, and are those on which the decision is founded.

Ann Colemere was a grocer and dealer at *Ellesmere*, and was indebted to the *Whitchurch and Ellesmere Banking Company* in the sum of £531, and owed about the same sum to other creditors. At the end of April last she applied to Mr. *Salter*, a solicitor, for an advance of money. Mr. *Salter* had in his hands a sum of £200, belonging to one *Carsley*, a blacksmith, the father of a clerk of Mr. *Salter*, which money had been left with Mr. *Salter* for investment; and he agreed to advance Mrs. *Colemere* £150 out of this money, and did advance it on the 19th of April, Mrs. *Colemere* agreeing to assign to *Carsley*, by way of security, all her property; and it was proved that all, or great part, of the £150 was applied by her in the payment of previous debts. On the 18th of May she executed a deed or bill of sale, assigning to *Carsley* "all the real and personal estate and effects, stock in trade, household furniture, goods, chattels, and other effects of the said *Ann Colemere*, of whatsoever nature or description, or wheresoever situate; together with all debts and sums of money due and owing to the said *Ann Colemere*" on trust, to take possession of the property, and sell

it, and out of the proceeds of the sale to pay himself the £150, interest, and costs, and to pay the residue to *Ann Colemere*. Under this deed *Carsley* took possession, and on the 25th of May he sold the stock in trade and goodwill for £106 to one *Lindop*, a shopman of Mrs. *Colemere's*, who then took the shop, and carried on the business in his own name, Mrs. *Colemere* keeping possession, as was alleged, of the house and furniture.

On the 8th of June *Ann Colemere* was adjudicated a bankrupt on the petition of the *Whitchurch and Ellesmere Banking Company*, the acts of bankruptcy alleged being the above-mentioned assignment, and also keeping house and causing herself to be denied; which latter ground was afterwards abandoned, and Mr. Commissioner *Sanders* confirmed the adjudication on the former ground.

Mrs. *Colemere* appealed.

Mr. *De Gex*, Q.C., and Mr. *Fry*, for the Appellant:—

There is no fraud whatever in this case; it is a simple borrowing by a tradesman in want of money to go on with. The consideration for the money consisted entirely of a fresh advance; and then it is clear from the cases that the onus of proving the deed to be fraudulent lies on those who impeach it as an act of bankruptcy, and in order to do so they must prove not only an intention on the part of the mortgagor, but that the mortgagee was cognizant of it, which was not the case here. They referred to *Whitwell* v. *Thompson* (1), *Hutton* v. *Cruttwell* (2), *Harris* v. *Ricketts* (3), *Bittlestone* v. *Cook* (4), and *Pennell* v. *Reynolds* (5).

Mr. *Bacon*, Q.C., and Mr. *Kay*, in support of the adjudication:—

In order to impeach such a deed as an act of bankruptcy, it is sufficient to shew an intention on the part of the mortgagor to defeat and delay his general creditors in fraud of the bankruptcy laws. The act is his only, and the statute does not say that the assignee must be an accomplice; and if the effect is to injure the other creditors, the assignor must be taken to have contemplated the consequences of his act.

[The LORD CHANCELLOR:—Can an assignment be good as

(1) 1 Esp. 68. (2) 1 E. & B. 15. (3) 4 H. & N. 1.
(4) 6 E. & B. 286. (5) 11 C. B. R. (N. S.) 709.

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regards the mortgagee, but an act of bankruptcy as regards the mortgagor?]

We submit that it may, the intention of the mortgagor being the criterion. The solicitor of the borrower must have known what the money was wanted for, and he was also the solicitor of the lender. As to the cases, *Hutton* v. *Cruttwell* is in our favour; *Harris* v. *Ricketts* has nothing to do with this question. Except the dictum in *Pennell* v. *Reynolds* (1), there is nothing to intimate that there must be a fraudulent knowledge on both sides, on which point the Act of Parliament is clear, for the act of bankruptcy is that of the bankrupt, not of any other person. It is clear that the solicitor who was employed on both sides knew all about it, and it was only a device between him and the bankrupt.

Mr. *De Gex*, in reply:—

[The LORD CHANCELLOR asked to be referred to the authorities, which shewed that the onus of proving fraud lay on those who sought to impeach such a deed.]

The authorities all go to shew that, *primâ facie*, an assignment even of all a trader's property, if made for a present advance of money, is not an act of bankruptcy, because it may be the wisest thing a trader can do, and may enable him to carry on his business and pay his debts. This is established by the cases cited, and also by *Whitmore* v. *Claridge* (2), in which case there was evidence of actual fraud by the bankrupt. Besides the dictum in *Pennell* v. *Reynolds* (1) we have the cases of *Harwood* v. *Bartlett* (3), *Loudon* v. *Sharp* (4), *Baxter* v. *Pritchard* (5), in which last case the bankrupt had intended to abscond, and did abscond, with the money, so that there could be no question as to his fraudulent intention.

Mr. *Bacon*, upon the cases cited:—

The application here is not against *Carsley*, but merely on the act of bankruptcy, whilst the cases cited are those of vendor and purchaser. It might lead to the greatest injustice if the validity

(1) *Ubi supra.*
(2) 31 L. J. (Q. B.) 140; and 33 L. J. (Q. B.) 87; 12 W. R. 214.
(3) 6 Bing. N. C. 61; 8 Scott, 171.
(4) 6 M. & G. 905.
(5) 1 Ad. & E. 456.

of a sale depended upon the intention of the seller; but the bankruptcy does depend upon that intention (s. 133 of the Act of 1849). The protection afforded to dealings and transactions by this section makes all transactions valid unless the lender has notice, therefore he is protected. But the question is, whether the trader, being insolvent, did commit an act of bankruptcy when he assigned his goods, not to a purchaser, but by way of security to a mortgagee, with intent to defeat and defraud his other creditors?

LORD CRANWORTH, L.C.:—

This is an important general question, and it has been ably argued on both sides; I do not think there has been any act of bankruptcy here. It appears that Mrs. *Colemere*, the alleged bankrupt, was carrying on a small business in the town of *Ellesmere* in the beginning of this year. She was no doubt in embarrassed circumstances. How far that was known to others does not appear very clearly, but she applied in the month of April to her solicitor, Mr. *Salter*, to try and effect through him a loan of money. Mr. *Salter* had in his hands £200 belonging to another client of his of the name of *Carsley*, a blacksmith in the neighbourhood, for the purpose of putting it out at interest; and in order to further the views of the client who wanted to borrow, and at the same time the views of his client who wanted to lend, Mr. *Salter* agreed that he would invest £150, part of *Carsley's* money, on loan to Mrs. *Colemere*, upon an assignment to him of all her stock-in-trade, and all her property, by way of security.

Was that, or was that not, an act of bankruptcy on the part of Mrs. *Colemere?* I do not think that the additional circumstances which are proved in evidence tend to throw light upon the subject. This loan, having been made on the 19th of April, and the bill of sale afterwards made, must be treated as parts of the same transaction. It appears that on the 25th of the following month of May, five weeks afterwards, the stock and goodwill of Mrs. *Colemere* were sold to another person, and she was manifestly insolvent. That might have been the motive in her mind which induced her to part with this property; and when she got this money, £150, she may have meant to apply it in paying certain creditors who, she thought, had a preferable claim to that of the

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bank. That I know not. It may or may not be so; but for the reason I will state I do not think it of importance.

The Act of Parliament (12 & 13 Vict. c. 106, s. 67) says, that if any trader shall make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, he shall be deemed to have committed an act of bankruptcy. This was a very old enactment, repeated from time to time in the successive Acts; and it was held that any assignment made by a trader of all his goods was fraudulent, because it prevented him from carrying on his trade, and so, that whenever a trader had assigned all his goods, he had committed an act of bankruptcy.

3 Ch 523.

But to this general doctrine a very reasonable qualification has been introduced that the assignment to be fraudulent must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade but for the purpose of paying some favoured creditor, or making some payments to all his creditors, otherwise than through the Court of Bankruptcy. In either of these cases it is an act of bankruptcy. But if it is for the purpose of enabling him to raise money to go on with his trade, that cannot be called a fraudulent act, as tending to defeat and delay his creditors, for it probably is, or may be, the wisest step he could take to promote the interest of his creditors. That being so, many cases have arisen in modern times as to the application of those principles to the enactment in question.

Now, in this case I think upon the facts I must come to this conclusion—certainly that Mr. *Carsley* did not know that he was lending this money for any fraudulent purpose of delaying creditors; and I think I must also come to the conclusion that neither was that known to Mr. *Salter*, who was his solicitor, and also the solicitor of Mrs. *Colemere*, the trader. I think I may assume that Mr. *Salter* knew that Mrs. *Colemere* had pressing creditors. Indeed she applied to him because she had some pressing creditors, and she wanted to get the money. But that does not appear to me to lead to the inference that *Salter* knew she was insolvent, or that she meant to apply this money otherwise than in the most legitimate way for the purposes of her trade. Nor am I satisfied that when the loan was made she had any such fixed intention.

It was said that what was known to the client must have been known to the solicitor. That must be taken with great qualification. Certainly, when a solicitor is acting for both parties, facts that are important to the matter in hand, and which are known to the solicitor, may be said to be known to both parties; but it is carrying that proposition a great deal further to say that all facts known to the client are to be taken as known to the solicitor; and to say that a fact not connected with the loan of the money, a mere intention in the mind of the borrower, if it existed, as to how she intended to dispose of the money which she borrowed when she got it, should be known to the solicitor, seems to me to be preposterous. Therefore I cannot look at this case in any other way than that *Carsley* had £150 which he honestly lent to this lady upon the assignment of all her property, that assignment being made concurrently with his advance.

The point which at one time pressed upon my mind during the argument, taken from the expression in some of the cases, was this —whether an assignment of all the property might not in the view of the law be taken to be of itself *primâ facie* evidence that it was fraudulent, throwing on the persons lending the money the burden of proving that it was not fraudulent. This would not in the present case make any difference in my mind, because I do not think that, in any view of the case, this assignment could be said to have been fraudulent. The only suggested fraud is not that the transaction itself was tending to delay the creditors, but that the mode in which the person who got the money afterwards dealt with it would delay the creditors. A person lending money upon an assignment of all, is just like a person lending money upon an assignment of half—it is a transaction which the party lending has a right *primâ facie* to suppose is perfectly honest, and will, or at all events may, conduce to the interests of the creditors instead of defeating them.

I assent to the doctrine as laid down by Mr. Justice *Willes* in *Pennell* v. *Reynolds* (1), which appears to me to be very correctly put: "A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or, from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat

(1) 11 C. B. R. (N. S.) 709.

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and delay the creditors, the deed cannot be impeached." I also refer to an observation of a very able judge whose loss we deplore, namely, Mr. Justice *Crompton*, in *Bittlestone* v. *Cook* (1), that it is very consistent with present mercantile usage that these advances should be made, and he suggests something which shews to me the great difficulty there would have been about this doctrine of an assignment of all, being necessarily fraudulent, when first established—he suggests this difficulty, that, even according to the doctrine then held, if a trader assigned one-third to *A*, one-third to *B*, and another third to *C*, they knowing nothing of each other's transactions, that would not be fraudulent. On these authorities it appears to me, therefore, that this is a perfectly unimpeachable deed.

Then, Mr. *Bacon* says the deed may be unimpeachable, yet it may be an act of bankruptcy. That I cannot understand, because if the deed is impeachable it can only be impeachable so as to constitute an act of bankruptcy because it is fraudulent. The deed itself, if fraudulent, would be impeachable; and if not impeachable, it is not an act of bankruptcy.

In my opinion, therefore, the Commissioner has come to an erroneous conclusion in this case, and consequently the adjudication must be annulled; but I do not think it is a case for costs. It was fully considered by the proper tribunal, and a decision has been come to which I think wrong, and it must be reversed without reference to costs.

L. C. 1865 *Dec.* 13.

In re LOVELL.

Bankruptcy—Allowance to Bankrupt.

Where the creditors of a bankrupt at the dividend meeting have not determined to make him any allowance under the Act of 1861, he is not entitled to any under the Act of 1849, the enactments on the subject in the old Act being impliedly repealed by those in the new Act.

Wolf. L.J. 237.

THIS was an application by a bankrupt for an allowance.

By section 195 of the *Bankruptcy Act of* 1849 (12 & 13 Vict. c. 106), it is enacted that every bankrupt who shall have obtained

(1) 6 E. & B. 311.

his certificate, if the net produce of his estate shall pay 10*s.* in the pound, shall be allowed and paid 5 per cent. out of such produce, provided such allowance shall not exceed £400, and a larger allowance, as therein specified, if the dividend be larger, and less if smaller.

By section 174 of the Act of 1861, it is enacted that, at the meeting for declaration of dividend, the majority in value of the creditors present shall determine whether any and what allowance shall be made to the bankrupt out of his estate, if he has obtained or shall obtain a discharge.

By section 230 of the Act of 1861, many sections of the Act of 1849, but not section 195, are expressly repealed, and also all such other parts of the old Act as may be inconsistent with the new Act.

The estate of the bankrupt in this case had paid a dividend of 10*s.* in the pound, but no resolution was passed by the creditors at the dividend meeting, making to the bankrupt any allowance on his obtaining his order of discharge.

The bankrupt applied to the Commissioner for the allowance to which he would have been entitled under the old law, but the Commissioner refused the application, and the bankrupt appealed.

Mr. *Sargood*, in support of the appeal, said that, though this power was given to the creditors, the section giving the bankrupt an allowance had not been repealed.

By section 194 of the *Bankruptcy Act of* 1849, it is enacted that it shall be lawful for the Court to make such allowance to the bankrupt out of his estate as shall be necessary for the maintenance of himself and his family until he has passed his last examination; and by section 109 of the Act of 1861, it is enacted that at the first meeting of the creditors after adjudication, a majority in value of the creditors present shall determine whether any or what allowance for support shall be made to the bankrupt up to the time of passing his last examination.

There was, therefore, no greater inconsistency between section 174 of the new Act and section 195 of the old Act than between section 109 of the new Act and section 194 of the old Act; and yet on these sections it had been held that, where the creditors were

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silent as to an allowance to the bankrupt, the power of the Court to grant such allowance still remained; *Ex parte Ellerton re Leach* (1). The 194th section only gave the Court a power, but the words of the 195th were mandatory, and gave a bankrupt who came within its conditions an absolute right to his allowance.

He distinguished *Ex parte Gibbons* (2) as being a case under a deed of arrangement, and referred in addition to *Re Beater* (3), *Re Maycock* (4), and *Ex parte Turner* (5).

Mr. *Bacon*, Q.C., and Mr. *Bagley*, in support of the order of the Commissioner, were not called upon.

The LORD CHANCELLOR was of opinion that section 195 of the Act of 1849 was inconsistent with section 174 of the Act of 1861, and was therefore entirely repealed by it. The decision of the Commissioner was right, and the bankrupt could not, under the circumstances of the case, claim any allowance. The appeal must be dismissed with costs.

(1) 10 Jur. N. S. 502.
(2) 13 W. R. 1001.
(3) 7 L. T. 287.
(4) 11 W. R. 1094.
(5) 12 L. T. 770.

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L. C.
1865
Dec. 4, 7, 8;
Jan. 12,
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Settlement—Marriage—Agreement to make will—Statute of Frauds—Part Performance.

Previously to a marriage the intended husband and wife agreed in writing that the husband should have the wife's property for his life, paying her £80 a-year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement; the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found:—

Held (reversing the decision of the *Stuart*, V.C.), that, under the circumstances, there was not within the *Statute of Frauds* any contract to make a will, and that there had been no part performance which would take the case out of the statute.

The marriage in such a case is no part performance.

Part performance by the party to be charged will not take a case out of the statute.

THE facts of this case, as stated by the bill, are as follows:—

In the autumn of the year 1852, the Rev. *R. B. Caton*, who was then a widower, aged about eighty, and of good fortune, made proposals of marriage to the Plaintiff, Mrs. *Harriet Caton*, then Mrs. *Henley*, a widow aged about sixty. She had a life interest in certain real estates in *Ireland*, and she was possessed of personal estate consisting of mortgages, railway debentures, and other property amounting to about £14,000. An agreement was made between Mr. *Caton* and Mrs. *Henley* that a settlement should be prepared, and Mr. *Caton* made a memorandum in his own handwriting, and signed it with his initials nearly in the following terms: "Mrs. *Henley* to have the whole of her fortune settled upon herself, and to go to the uses of her will, but the annual interest on her fortune to be received and taken by Mr. *Caton* for and during his life, with the exception of £80 a-year to be paid to Mrs. *Henley* under the denomination of pin-money. The house, No. 75, *Seymour Place*, the property of Mr. *Caton*, at his decease is given to Mrs. *Henley* for her life, at her decease to go to the uses of Mr. *Caton's* will. Also his household furniture, plate, linen, china, given at his decease to Mrs. *Henley*. Mrs. *Henley* to have liberty

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to withdraw £2000 for the purchase of a house, said house to be settled on herself. All property that may fall into Mrs. *Henley* during the marriage to be her sole property, and subject to the uses of her will, but her husband to have the annual rent or interest of said property during his life. Mrs. *Henley* to be entitled to receive at my death the half year's rents that shall then be due."

This memorandum was sent to a Mr. *Emmet*, who had been Mrs. *Henley's* solicitor, and he laid a copy of it before counsel as instructions, omitting, by the direction of Mr. *Caton* and Mrs. *Henley*, the provision as to the £2000, and the half-year's rents.

A draft settlement was accordingly prepared and sent by Mr. *Emmet* to Mrs. *Henley* on the 5th of January, 1853, and she handed it over to Mr. *Caton* on the next day, and Mr. *Caton* and Mrs. *Henley* went with the draft settlement to Mr. *Emmet*, and expressed their approbation of the draft. A fair copy was then prepared by him which included, as part of the property to be settled, the *Irish* property, in which Mrs. *Henley* had a life interest. On the 7th of January, this was sent back by them to Mr. *Emmet*, with directions to strike out of the settlement all that related to the *Irish* property, and also to make certain alterations as to the mode of receiving the interest. The object of that was said to be that the *Irish* property was already so settled that Mrs. *Henley* would have it for her life for her separate use, and that it was unnecessary to encumber the settlement with any mention of it. Mr. *Emmet* accordingly got the alterations made, and sent the draft so altered to Mrs. *Henley* on the 11th of January, but on the same day Mr. *Caton*, in a conference which he had with his intended wife, represented to her that the engrossment of the settlement, as proposed, would cost a good deal of expense, which he was desirous of avoiding; and he promised that, if the Plaintiff would forego the execution of the settlement, he would most strictly and faithfully carry out the terms of the marriage contract agreed upon, and would leave to her by his will the whole of her then and her after-acquired property if any, and would also leave her the house in *Seymour Place* for her life, and the furniture which might be in his residence at his death absolutely. Mrs. *Henley* assented, and on the next day Mr. *Caton* and Mrs. *Henley* went to Mr. *Emmet*,

and said that they had given up all notion of having any settlement, and he need take no further trouble on the subject. Mr. *Emmet* remonstrated very strongly against this, and told Mrs. *Henley* that she was doing a very imprudent thing, and strongly pressed her not to consent to anything of the sort. Mrs. *Henley* expressed her perfect confidence in Mr. *Caton*, who repeated his promise, and finally the draft settlement was given up to Mr. *Emmet*, certain parts of it having been struck out, but it did not clearly appear by whom.

Mr. *Emmet* again wrote to Mrs. *Henley*, remonstrating against what had happened, and pointing out to her that a will was always revocable, and that she was taking a very imprudent step in not requiring the property to be settled. She handed his letter over to her intended husband, Mr. *Caton*, who was very angry that his word should be doubted, and repeated his promise as above stated, and finally they agreed that there should be no settlement, and that she should trust to his promise.

On the 7th of February, 1853, the marriage took place. Mr. *Caton* had, previously to the marriage, prepared a will, and immediately after the marriage had been celebrated, the husband and wife, as stated by Mrs. *Caton*, went into the vestry, and there he executed his will. She further stated that after the execution he read out to her an absolute bequest to her of the whole of the fortune to which she was then entitled, or might become entitled, during the coverture; and also a bequest of the furniture and chattels in his house at his death to her absolutely; and also a bequest of the house in *Seymour Place* to her for her life.

Mr. *Caton* died on the 24th of January, 1864, leaving Mrs. *Caton*, and two sons and a daughter, his children by a former marriage. He had made a will, dated the 4th of May, 1863, by which he appointed his widow and his two sons his executors, and bequeathed to her a life interest in a sum of £2000, which had formed part of her property, and in a sum of £9000 Consols, and in two leasehold houses; and he gave her his furniture, &c., and some promissory notes, and railway shares, absolutely. The will was proved by the sons alone.

In August, 1864, Mrs. *Caton* filed a bill against the sons as executors, stating as above stated, and alleging that she had

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married Mr. *Caton* upon the faith, and in consideration of his promise, that he would strictly and faithfully carry out the terms of their marriage contract as agreed to, and would by his last will leave her the whole of the property of which she was possessed, or to which she was entitled at her marriage; and also all her after-acquired property; and also the house in *Seymour Place* for her life, and all his furniture and effects; and that at all times during the coverture he had led her to believe that he strictly and faithfully observed and abided by the said contract, and the bill prayed a declaration accordingly, and accounts.

The Defendants, by their answer, denied that any such agreement was made as alleged, and denied the Plaintiff's case generally, and pleaded the *Statute of Frauds*.

The cause went to issue, and much evidence was taken, which was either irrelevant or immaterial, according to the view of the case taken by the LORD CHANCELLOR. There was some evidence to confirm the fact of the execution of the will in the vestry, but nothing further was proved as to the will itself, which was not forthcoming. The house in *Seymour Place* had been sold with the consent of the Plaintiff. Mr. *Caton* had taken possession of his wife's property, and had paid her £80 a-year. In a joint affidavit made by Mr. and Mrs. *Caton*, in May, 1853, on getting some money out of Court, they swore that no settlement or agreement for a settlement had been made on their marriage, and the Defendants alleged other facts tending to shew that there was no agreement as to making any will. Two letters in Mr. *Caton's* handwriting were found, addressed to Mrs. *Caton*, in which he expressed his hope that his will would be found just and fair, and gave explanations about the terms of it. The other material facts in the case are mentioned in the judgment given below.

The cause came on to be heard before the Vice-Chancellor *Stuart*, who, on the 11th of May last, made a decree in favour of the Plaintiff, delivering judgment to the following effect:—

"In this case there are only two material questions. First, whether the agreement, which is stated in the pleadings and is the foundation of the relief prayed for, is sufficiently proved; and, secondly, whether, if it be, the *Statute of Frauds* interposes to

prevent the Plaintiff's title to relief. As to the evidence of the agreement, it is distinctly sworn to, not only by the Plaintiff, but also by Mr. *Emmet*, a perfectly impartial witness; and it is impossible to say, without considering that both these individuals have been guilty of perjury, that there is not clear and distinct evidence of the agreement alleged in the bill. The documentary evidence is strongly confirmatory of the parol testimony. The memorandum in the handwriting of the late Mr. *Caton* distinctly shews an agreement by which, in consideration and in contemplation of the marriage, he agreed that the Plaintiff's whole fortune should be settled upon herself, to go to the uses of her will, but the annual interest of her fortune during the coverture to be taken and received by himself. If the case had been one for the specific performance of the agreement as stated in this document in the handwriting of the late Mr. *Caton*, I think there could have been no doubt about it. The substance of that agreement is essentially the same with the agreement, performance of which is sought by the bill; the only difference is in the machinery by which the whole of this lady's fortune, after having been enjoyed by her husband during his life, was, if she survived him, to belong absolutely to herself. In other words, it is clear evidence of an agreement in writing that one of the considerations which induced this lady to contract the marriage was the stipulation that her husband's marital right should not attach to her property, but should be restricted to his enjoyment of it during his lifetime. I do not enter into the details of the agreement, because I consider the question to be one of great importance, and I think it is not to be disposed of upon the small details, one of which is the £80 which was to be enjoyed by the Plaintiff during the life of her husband.

"It has been suggested by the counsel for the Defendants, that what the late Mr. *Caton* agreed to do was, to make a provision for the Plaintiff for life out of her own property, or rather, out of part of her own property. This suggestion is not only not proved, but it is wholly inconsistent with the probabilities of the case, and wholly inconsistent with the parol evidence relating to it. If there be sufficient evidence of an agreement by the husband to restrict his marital rights over the wife's property in this way, as

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I have already observed during the argument, the husband's marital right by the law of *England* over the property of his wife is by no means an absolute right; it is qualified in a most important particular. No doubt, by the law of *England*, marriage operates as a gift to the husband of the whole of the personal property of his wife, but the rule is coupled with this qualification, that if the husband does not reduce the property into possession during the coverture, it survives to the wife absolutely. The Court is constantly in the habit of recognizing this right, and of giving to the wife during her coverture, as that right, a provision out of her own property.

"I make the observation that the right is qualified, because it is of great importance to look at what it is that is the subject of the contest, and when the question which occurs in this case is, how far the husband has extended the qualification which the law puts upon his marital right, I am not aware whether the Court would not go a great length in a question of evidence as to what occurred before the marriage, as to what the husband may have done in the way of promise, which the Court would fasten into an obligation upon him for a reasonable restriction of his marital rights. The ages of the parties contracting this marriage, and all the circumstances of the case, prove to my mind the entire reasonableness of the provision which was contemplated by this document.

"But it is said that relief cannot be granted upon it; and it is true that this document, which is in the handwriting of Mr. *Caton* himself, and has reference to what he and his intended wife had agreed to do with the property before the marriage, is not the agreement itself of which the performance is sought. It is simply a note, a memorandum, in his own handwriting, as to what was intended to be done on the subject. The 4th section of the *Statute of Frauds* (upon which counsel for the Defendant has very properly relied) enacts that 'an action or suit to charge any person, upon any agreement made in consideration of marriage, must be in writing and signed,' and contains also the provision that any contract for the sale of land must be equally in writing. The section says that all contracts of that kind, whether contracts for the sale of land, or agreements made in consideration of marriage, must be in writing. I make that observation

for the sake of observing further, that all the decisions upon the questions which have perplexed the Court with reference to the operation of this statute, and the cases in which, upon mere evidence of a parol agreement, or of part performance of a parol agreement, the Court has held that the case was taken out of the statute, appear to me to apply to all such questions as arise in the present case. There is a large class of cases where a testator has intended to leave by his will a sum of money to a particular person, and his executor has undertaken, without being directed by the will, to make good to the legatee the intended legacy, and the testator has thereupon forborne to mention the legacy in his will, in which the Court has, notwithstanding the *Statute of Frauds*, interfered, and, in order to prevent a fraud, given to the legatee, who is not named in the will, that which the executor has promised to the testator should be given to the legatee after the death of the testator, just as much as if it had been given by will. The authorities on this subject are very numerous. There is a decision of Lord *Nottingham* in the case of *Chamberlaine* v. *Chamberlaine* (1), where the Defendant, an executor, having solemnly merely by parol undertaken the payment of certain legacies, the Lord Chancellor, in giving judgment, said it was the constant course of this Court to make such decrees upon promises made that the testator would not alter his will. In the case of *Strickland* v. *Aldridge* (2), Lord *Eldon* only repeats what has been said by other great judges with reference to the *Statute of Frauds*, when he says, 'The statute is never permitted to be a cover for fraud upon the private rights of individuals. It would be singular if the Court would protect individuals and would not act to prevent a fraud upon the law itself.'

"What is proved in the present case is, that the testator and his intended wife having proposed to make a settlement (the draft of which was prepared in accordance with that memorandum which is in his own handwriting), changed their intention as to the machinery, and, instead of a settlement, it was proposed, and agreed to by both parties, that the testator, the intended husband, should by will do that which it was originally intended he should do by settlement. The parol evidence on that

(1) Freem. Ch. R. 34. (2) 9 Ves. 516.

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subject is perfectly clear; but, it is said, it is parol. I am aware that it is parol, but with evidence in writing to support it. What took place was, that immediately after the marriage, in the vestry of the church in which the marriage had been solemnized, a will, which carried out what was agreed to, was executed by the testator, read over by him to his wife, and given by him to her (as is sworn) to read for herself. The only thing that remained for a full performance of the contract which was agreed upon was, that the testator should not alter that will. There is an abundance of decision that, in order to prevent fraud, although the agreement has been made in parol, if anything has been done upon the faith of it, much more if there be anything in writing and signed in part performance of it, the statute will not apply, and the Court will grant relief. I am at a loss to know what act of part performance of an agreement to leave by will a certain provision could be more complete than the execution of a will conformable to that contract. In fact, it is so far more than a part performance, that it is a performance. All that is necessary is, that what has been done shall not be undone. All that is necessary is that what the testator has done, and shewn to his wife, should not be annulled or destroyed. Now this is the most essential part of the part performance, and I have no hesitation in coming to the conclusion that the doctrine laid down in *Lassence* v. *Tierney* (1) would not be applicable to the question before this Court. In the present case I feel bound to hold that the testator did that which was intended to be a complete performance of the agreement. If he had let it alone, there was nothing more for him to do; he had simply to abstain from violating the promise which he had made. Now the present case seems to me to be much stronger than that of *Chamberlaine* v. *Chamberlaine*. There the testator tells his residuary legatee, or his executor, that he intends to alter his will by giving a legacy of £1000 to *A. B.* The executor says merely by word of mouth, 'Do not alter your will, I will pay him £1000.'

"Here there is a promise which the testator has been proved, to my satisfaction, to have made, and which, it is to be deplored, he has violated. There must be a declaration to the effect that the Plaintiff is entitled to the property of which she was possessed at

(1) 1 Mac. & G. 551.

the date of her marriage; and of all the property which has accrued to her during the coverture, with the usual inquiries."

The Defendants appealed.

Mr. *Malins*, Q.C., and Mr. *L. Webb*, for the Plaintiff, contended that the sons were in possession of property obtained by a false and fraudulent representation, and could not retain it even if the contract was not binding on account of the *Statute of Frauds*. But the marriage was a sufficient part performance to take the case out of the statute: *Gregory* v. *Mighell* (1); *Strickland* v. *Aldridge* (2); *Podmore* v. *Gunning* (3); *Prole* v. *Soady* (4); in which case on the appeal, the Lords Justices, finding that the parties could not agree upon the facts, desired a compromise, which was assented to, the counsel for the Defendants being of opinion that they could not maintain the case on the *Statute of Frauds*. Here Mrs. *Caton* abandoned her settlement, and assented to the marriage, on the representation by Mr. *Caton* that he would make this will. If he had not made that promise the marriage would never have taken place. Can it be believed that she would have placed it in his power to leave her destitute? The plea of the *Statute of Frauds* did not prevail in *Walford* v. *Gray* (5); *Ridley* v. *Ridley* (6). The statute cannot be used to cover fraud: *Muckleston* v. *Brown* (7); *Nunn* v. *Fabian* (8); *Chamberlaine* v. *Chamberlaine* (9). Moreover, under the *Statute of Frauds* no contract need be in writing which can be performed within the year: *Boydell* v. *Drummond* (10); *Bracegirdle* v. *Heald* (11); *Peter* v. *Compton* (12); *Wells* v. *Horton* (13); *Hammersley* v. *De Biel* (14).

Sir *H. Cairns*, Q.C., Mr. *Greene*, Q.C., and Mr. *Elderton*, for the Defendants:—

Hammersley v. *De Biel* was not decided on the *Statute of Frauds* as is explained in *Mansel* v. *White* (15). The principles

(1) 18 Ves. 328.
(2) 9 Ves. 516.
(3) 7 Sim. 644.
(4) 2 Giff. 1.
(5) 13 W. R. 335.
(6) 13 W. R. 763.
(7) 6 Ves. 52.
(8) Law Rep. 1 Ch. 35.
(9) Freem. Ch. R. 34.
(10) 11 East. 142.
(11) 1 B. & A. 722.
(12) 1 Sm. (L. C.) 283.
(13) 4 Bing. 40.
(14) 12 Cl. & F. 45.
(15) 4 H. L. C. 1055.

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are well laid down in *Money* v. *Jorden* (1). *Chamberlaine* v. *Chamberlaine* was probably before the *Statute of Frauds*, and went on personal liability. What document is it which has been signed within the statute? the proposals? and in which shape and after what alterations? Does the alleged contract refer to the original memorandum or the draft settlement, and where is any written agreement to make a will? The onus lies on the Plaintiff to shew what precise agreement she relies on. Mr. *Caton* said to his wife, let us have no settlement, but rely on me to do what is right, and he has done what he thought right. She has had for ten years the enjoyment of his fortune, as well as her own; he has now left her what he thought right; and there is no fraud in the matter. Moreover, the case is not put by the bill on fraud, but on an alleged contract, the distinction being clear. *Montacute* v. *Maxwell* (2). The decree deprives the testator's estate of £15,000 and leaves her what she takes under his will; she cannot have both.

Mr. *Malins*, in reply.

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Jan. 12. LORD CRANWORTH, L.C., after stating the facts of the case, and saying that in the view he took of the case it would not be necessary to consider the exact evidence given by each of the witnesses, said:—

The Defendants by their answer deny that any such engagement as that alleged by the Plaintiff to have been entered into was ever entered into by the testator. Certainly there was no contract in writing, signed by him; and they insist on the *Statute of Frauds* as presenting an insuperable bar to the relief which is sought by the bill. The *Statute of Frauds* prevents the bringing of any action on any contract entered into in consideration of marriage, unless it has been reduced to writing and signed by the party to be charged; and this Court, unless there be equitable grounds for taking a case out of the operation of the statute, has always held itself as much bound by its provisions as the Courts of law. That no action could be maintained on the alleged parol contract,

(1) 5 H. L. C. 185. (2) 1 P. Wms. 620.

on the foundation of which relief is sought in this suit, is a proposition which admits of no doubt. Courts of law are expressly forbidden to entertain any such actions. Unless, therefore, something can be discovered in the conduct of the parties varying their legal rights, no suit for the specific performance of this alleged contract can be entertained in this Court. It would be a scandal to suppose that when the Legislature has said that no action shall be brought on a parol contract of a particular description, it should be open to one of the contracting parties to escape from the consequence by simply shifting his sphere of operations from a Court of law to a Court of equity. This, indeed, was not contended for on the part of the Plaintiff, but it was argued that there are in this case equitable grounds enabling the Court to give relief, notwithstanding the statute. The same clause of the statute which forbids the bringing of an action on any parol contract made in consideration of marriage, also forbids the bringing of any action on any parol contract for the sale of land. But, though Courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it when to insist upon it would be to make it the means of effecting instead of preventing, fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract. His Honour the Vice-Chancellor *Stuart*, according to the report of this case, appears to have thought that the decisions under this head of equity (and they are very numerous) are applicable to the present case, but with all deference to the Vice-Chancellor, I cannot think that this is a correct view of the law.

That marriage itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity.

It was not, however, on the mere fact of the marriage that the Vice-Chancellor rested his judgment. His Honour relied mainly on the circumstance which he considered to have been well proved, that, previously to the marriage, the intended husband, in con-

L. C. 1866 CATON v. CATON.

formity with the verbal promise he had solemnly made to his wife, prepared a will whereby he gave to her all that he had agreed to give her; and further, that he had executed this will in due form of law immediately after the solemnization of the marriage. I do not however think, even if all this had been clearly made out in proof, that it amounts to any part performance so as to prevent the operation of the statute. The ground on which the Court holds that part performance takes a contract out of the purview of the *Statute of Frauds* is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money. But such cases bear no resemblance to that now under consideration. The preparing and executing of the will caused no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged. If I agree with *A*, by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling *A* to complete the purchase, but it certainly would afford no foundation for a claim by *A* to compel me to sell on the ground that I had partly performed the contract. The circumstance of the preparing and executing the will (supposing it satisfactorily proved) might afford strong evidence of the existence of the parol contract insisted on, if that were a matter into which we were at liberty to inquire; but it can have no effect as giving validity to an otherwise invalid contract. I must further observe that the nature of the alleged agreement was such as hardly to admit, even on the part of the party to be charged, of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature—a contract not to vary what has been so pre-

pared and executed. I do not see how there can be part performance of such a contract.

It was contended this case might be likened to those where, notwithstanding the *Statute of Wills* and the *Statute of Frauds*, it has been held that when a person has induced another to make or abstain from making or altering a will, on the assurance that, on his death, his intention shall be carried into effect, there the Court has held the person, who has so engaged, to be bound to fulfil his engagement, and has held that he took whatever had passed to him on the faith of such engagement, merely as a trustee for the purpose of fulfilling that engagement.

I do not feel myself called upon to discuss the principle on which several of the cases rest; such, for instance, as *Sellack* v. *Harris* (1) and *Strickland* v. *Aldridge* (2). They have no application to the present case, for there is no question here, whether those who derive title under the deceased husband are affected by any personal equity arising from any assurance given by them; they merely claim what the law gives them. If there had been any principle which would intercept this property in its progress from the testator to them as legatees, their title no doubt would have been defeated; but there is nothing which, when the property has reached them, makes it inequitable in them to insist on their full right to the enjoyment of what has been so bequeathed to them.

I am of opinion, therefore, that there was no ground for filing this bill, and that it ought to have been dismissed with costs.

It would have been a very satisfactory thing to me to find that I could honestly say here that there should be no costs; but I have a very strong opinion upon that subject. It is that costs are not directed to be paid as a punishment, but that having been caused by the conduct of the losing party, they ought to be borne by those who have occasioned them.

Solicitors for the Plaintiff: Messrs. *Emmet & Son.*

Solicitor for the Defendants: Mr. *T. H. Dixon.*

(1) 5 Vin. Abr. 521. (2) 9 Ves. 516.

L. C.
1866
Jan. 15.

In re STARK.

Bankruptcy—Majority of Creditors—Securities.

A deed of arrangement with creditors may be registered if assented to by a majority in number representing three-fourths in value of the creditors without deducting the amount of the securities held by such creditors as are secured.

A TRADER had executed a deed of arrangement with his creditors in the form prescribed by s. 192 of the *Bankruptcy Act*, 1861, and it had been assented to by a majority in number representing three-fourths in value of the creditors, if no deduction was made for the value of the securities of the creditors who were wholly or partially secured, but not so if the value of the securities was deducted.

The Registrar felt a difficulty in registering the deed, and

Mr. *C. Hall* applied for an order to have it registered, referring to *Whittaker* v. *Lowe* (1) as deciding that such a deed was good, and *Re Smith* (2) in which there was a dictum by Lord *Westbury* to the contrary: *Re Shettle* (3).

The Lord Chancellor said, that what had been laid down by Lord *Westbury* in *Re Smith* was consistent with good sense, but as *Whittaker* v. *Lowe* had been solemnly decided by the Judges, his Lordship thought that he must allow the deed to be registered.

Solicitors: Messrs. *J. & J. K. Wright.*

L. C.
1866
Jan. 15, 25.

In re LEEDS BANKING COMPANY.

Practice—Contributory—Fi. fa.

When the official liquidator desires to issue a writ of *fi. fa.* against a contributory who has not paid a call, he must obtain an order for payment to himself under the 38th Order of the 11th of Nov. 1862.

IN this case a call had been made under the *Winding-up Acts*, and the order making it was in the form prescribed by the orders of the

(1) Law Rep. 1 Ex. 74.
(2) 10 L. T. (N. S.) 803.
(3) 1 D. J. & S. 260. See Griff. on Arrangement, 35.

11th of November, 1862, No. 36, ordering payment to be made by each contributory into the *Bank of England* to the account of the official liquidator. Notice of this order had been duly served on one of the contributories who had not paid the amount on the day appointed, and the official liquidator applied for a writ of *fi. fa.*

The Clerk of Record and Writs declined to issue the writ on the ground that the 29th Cons. Ord., Rule 6, under which the writ would issue, only spoke of payment to a *person*, and not to an account.

Mr. *Cotton*, for the official liquidator, now mentioned the matter to the LORD CHANCELLOR, referring to section 103 of 25 & 26 Vict. c. 89, and also to section 95, rule 7, and section 120. He also referred to *Gibbs* v. *Pike* (1); *Ward* v. *Shakeshaft* (2); *Ex parte Thomas* (3), and to a case of *Re Waterloo*, 27th of May, 1864, where the Master of the Rolls had directed a writ to be issued in a similar case.

Jan. 25. LORD CRANWORTH, L.C., after having consulted with Mr. *Murray*, the Clerk of Records and Writs, delivered a written note to the following effect:—

When there has been an order on a contributory to pay money into the bank to the account of the official liquidator, and it is desired to enforce that order by issuing a writ of *fi. fa.*, the official liquidator, or other person seeking to enforce the order, must follow the course prescribed by the 38th Order of the 11th of November, 1862, *i.e.*, he must obtain an order for payment of the sum in question to the official liquidator himself.

This order may be obtained without notice at any time after the order has been made for payment of the money in question into the bank. There seems no reason why, if before any order has been made for payment into the Bank, the Court is satisfied that the issuing of a writ of *fi. fa.* must eventually be resorted to, the Court should not at once and in the first instance make an order for payment to the official liquidator.

Solicitors: Messrs. *Freshfields & Newman.*

(1) 8 M. & W. 223; 9 M. & W. 351. (2) 8 W. R. 335.
(3) 9 C. B. 740.

L. C.
1866
Jan. 30.

In re TURNLEY.

Practice—Costs—Trustee Relief Act—Tenant for Life.

Where a trust fund has been paid into Court under the *Trustee Relief Act*, the tenant for life will have his costs of a Petition for payment to him of the dividends, out of the *corpus*.

JOSEPH TURNLEY, by his will, dated the 21st of January, 1827, gave to trustees certain real estate and personal estate upon trust to receive the rents and dividends thereof during the life of his granddaughter *Ann Cuff*, and to pay the same, when received, to her for her life, for her own use, and without being liable to the control of any husband, and so that she could not deprive herself thereof by anticipation; and after her death upon trust to sell and convert the said real estate and personal estate, and divide the proceeds amongst her issue as therein mentioned. The testator died in 1848, and *Joseph Turnley*, the surviving trustee, sold and converted all the property, and invested the proceeds in £1000 Consols, which in January, 1866, he transferred into Court under the *Trustee Relief Act*. *Ann Cuff* now presented a Petition, asking payment of the dividends to her during her life, and that the costs of the Petitioner and of all other proper parties, of this application, might be taxed, and that a sufficient part of the £1000 Consols might be sold to raise and pay the amount of the costs so taxed. The Petition appeared to have been served on the trustee and the husband of the Petitioner only, and it came on to be heard before the Master of the Rolls, who doubted if he could order the costs of the Petitioner to be raised and paid out of the *corpus*, and wished the matter to be mentioned to the Lord Chancellor.

Mr. *Chitty*, for the Petitioner, handed up the following list of cases on the subject, shewing that the practice varied in the different branches of the Court:—*Ross's Trust* (1); *Butler's Trust* (2); *Bangley's Trust* (3); *In re Ingram* (4); *Hadland's Set-*

(1) 15 Jur. 241; 1 Sim. (N. S.) 196.
(2) 16 Jur. 324.
(3) 21 L. J. (Ch.) 875.
(4) 18 Jur. 811.

tlement (1); *Hamersley's Settlement* (2); *Whitling's Settlement* (3); *Tchitchagoff's Will* (4); *Leake's Trusts* (5); *Eady* v. *Watson* (6).

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LORD CRANWORTH, L.C., said that in his opinion the *Trustee Relief Act* merely substituted a different form of proceeding. Under the old practice, if the trustee refused to pay, or the tenant for life for any reason could not get his income, a bill was filed; but in that case the tenant for life always got his costs out of the *corpus*, and there was no reason to alter that practice. His Lordship thought that the tenant for life ought to have his costs out of the *corpus*.

Solicitor: Mr. *C. Wellborne*.

In re POWER.

L. C. 1865 *Dec.* 13.

Bankruptcy—Registration of Deed—Time.

The Lord Chancellor has no power to direct a trust deed to be registered under the *Bankruptcy Act*, 1861, when more than twenty-eight days have elapsed since its execution, although the deed may have been left with the Registrar, and an application for registration may have been made to the Commissioner within the twenty-eight days.

BY section 192 of the *Bankruptcy Act*, 1861, it is made a condition to the validity of a trust deed for the benefit of creditors that, within twenty-eight days from the day of execution by the debtor, it shall be produced and left at the office of the chief Registrar for the purpose of being registered; and by an order of the 22nd of May, 1862, it is ordered that every such deed left for the purpose of being registered shall contain a schedule of debts, and be accompanied by an affidavit *by the debtor* verifying the same.

The debtor in this case executed the deed on the 14th of November, and the deed was left for registration on the 9th of December, but the debtor being out of the country, the affidavit was made by his clerk.

(1) 23 Beav. 266.
(2) 23 Beav. 267.
(3) 9 W. R. 830.
(4) 12 W. R. 1100.
(5) 32 Beav. 135.
(6) 33 Beav. 481.

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The registrar refused to register the deed, and an application was made on the 11th of December, the last of the twenty-eight days, to Mr. Commissioner *Goulburn*, who refused to direct the registration.

Mr. *North* now applied, on behalf of the debtor, to have the deed registered *nunc pro tunc*, the application having been made to the Commissioner within the time, and improperly refused, as was contended.

LORD CRANWORTH, L.C.:—

I have no authority to do what is asked. The Act says that a deed executed in a particular manner shall be binding, if certain formalities are observed. All these requisites should be strictly complied with, as the effect of the deed is to bind absent and non-consenting parties. No power is given to the LORD CHANCELLOR, or any one else, to dispense with any of these conditions, and I have no more authority to direct that this deed shall be registered after twenty-eight days than after twenty-eight years.

Solicitors: Messrs. *Marshall & Roberts.*

See *Wishart* v. *Fowler*, 10 Jur. (N.S.) 633, and *In re Skinner*, 10 Jur. (N. S.) 1137.

L. C. 1865 *Nov.* 8; *Dec.* 9.

Ex parte BANFIELD.

Bankruptcy—Composition Deed—Execution—Laches.

Where a creditor who had not assented to a composition deed allowed proceedings to go on under the deed for eleven months, and then applied to have the registration of the deed rescinded, or for leave to issue execution, the Court refused to interfere, and left the creditor to his legal remedy.

MESSRS. *ELLIS, NEWMAN, & ELLIS*, the debtors in this case, were in partnership as shipowners, and on the 14th of May, 1864, they executed a composition deed under section 192 of the *Bankruptcy Act*, 1861. On the 11th of June, 1864, they obtained leave from the Commissioner to register the deed under section 200, as a deed executed without the consent of the ordi-

narily requisite majority of creditors, on the allegation that the assent could not be obtained, as they were unable to ascertain who had some bills of exchange, and as several of the creditors were in a foreign country.

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On the 25th of August, 1864, the debtors were arrested under a writ of *ca. sa.*, issued by Mr. *Banfield*, a judgment creditor for £498, who had not assented to the deed, and disputed its validity: and on the 27th of September, 1864, they were, on the production of the deed with the certificate of registration, on which they insisted as a protection, discharged by Mr. Justice *Shee*, on an application made to him in Chambers.

The estate of the debtor was then administered under the deed, and part of it had been distributed, when on the 8th of July, 1865, Mr. *Banfield* made an application before Mr. Deputy-Commissioner *Winslow*, first, to have the order for registration of the deed rescinded on the ground of suppression of facts by the debtors, and their omission to make the proper inquiries; and, secondly, for leave to issue execution, notwithstanding the deed, on the ground of its invalidity.

This application the Deputy-Commissioner refused with costs; as to the first portion of it, on the ground that, even if the order had been made on a state of facts not altogether satisfactory, it had been acted upon, and a creditor had no right to lie by for nearly a year and then come to the Court to have it rescinded; and as to the second portion of it, on the ground that Mr. Justice *Shee* having decided that the requirements of the statute had been complied with, the Deputy-Commissioner ought not to try that issue over again.

Mr. *Banfield* appealed.

Mr. *De Gex*, Q.C., Mr. *Reed*, and Mr. *Stone*, for the Appellant:—

There has been no such delay as to exclude a creditor from his right to have removed out of his way the difficulty interposed by a bad certificate of registration. Such a certificate is held to be *primâ facie* good, and on this ground was allowed by Mr. Justice *Shee* as a sufficient reason for discharging the debtor without any proof that the proper assents had been obtained—his Lordship holding that, if this had not been the case, the proper course was to

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make such an application to the Court of Bankruptcy as has been made in this case. That Court is, indeed, much the most convenient tribunal to try the question of the proper proportion of assents, which can be then inquired into in detail, in a manner quite impracticable before a Judge in Chambers, or even in an action. This, then, being the creditor's right, he has never waived or abandoned it, or improperly delayed the assertion of it. He brought an action, prosecuted it with diligence and effect, and as the learned Judge required leave to be obtained from the Court of Bankruptcy before the *ca. sa.* could be allowed to take effect, this application was made to the Court of Bankruptcy, and the subsequent time is accounted for by the necessary examinations and inquiries. Nor can it be said under those circumstances that the validity of the deed was tried before Mr. Justice *Shee.* Moreover, in the affidavit as to the absence of creditors, several important facts were suppressed; and this was of itself a sufficient ground for discharging the certificate. But, independently of this, when a creditor challenges the correctness of the certificate of registration in such a case as this, the debtor must prove, not only that creditors are abroad, but that he cannot obtain their concurrence by reason of their being abroad, and must prove in detail, if requisite, that the requisite proportion of all the other creditors have assented. The *onus probandi* in this case must be on the debtor, and here the debtors have quite failed to discharge themselves from it. The view taken by Mr. Justice *Shee,* that the Court of Bankruptcy, and not the Judge in Chambers, is the proper tribunal to decide the question, is in accordance with the cases on this point: *Ipstones Park Company* v. *Pattinson* (1); *Baerselman* v. *Langlands* (2); *Skilton* v. *Symons* (3).

Mr. *Bacon,* Q.C., and Mr. *Bagley,* on the other side, contended that the creditor had no right to lie by for nearly a year, and then come to the Court to rescind the order to the prejudice of all the other creditors, although it may have been originally made on a state of facts not altogether satisfactory. The order had been acted upon, and it would cause serious injury to undo all that had been

(1) 33 L. J. Ex. 193. (2) 34 L. J. Ex. 3.
(3) 13 W. R. 409.

done. They also argued on the facts that the order for registration was properly granted. They cited *Ex parte Groome* (1), as to the discretion of the Commissioner in such a matter.

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Mr. *De Gex*, in reply.

Dec. 9. LORD CRANWORTH, L.C.:—

I think that the Deputy-Commissioner has, in this case, exercised a proper discretion. If this deed was invalid for want of assent by the requisite number of creditors, and no such deed has been executed as the statute requires, then the legal rights of the creditors are saved, and may be exercised by them. But in this case, if the creditor wants the sanction of the Court of Bankruptcy to the exercise of his legal remedies, I think that that sanction was properly withheld. No application was made by the creditor to the Court of Bankruptcy for eleven months after the order of Mr. Commissioner *Fane*, during the whole of which time the creditor in question has been lying by, and proceedings have been going on. Now, to interfere with those proceedings would create very great embarrassment, though that consideration would afford no argument if the creditor sought to enforce a legal right. But here, that which he seeks is not a legal right, but a matter within the discretion of the Court, for I am of opinion that the cancelling the registration of a deed, and the giving leave to a creditor to take in execution the property of the debtor, are matters within the discretion of the Court; and in this case, looking at the nature of the deed, and at what has taken place, I think that the exercise of such discretion would be very wrong. Not only has there been long delay on the part of this creditor, but the effect of the deed is to give the creditors in general the full benefit which they might have derived under the bankruptcy. As I have said, if the deed has not been executed by the requisite number of creditors, there is nothing to bar the legal rights of the creditors; and the Deputy-Commissioner did not mean to decide contrary to that. It may be that on an application to a Court of law to discharge

(1) 13 W. R. 302.

L. C. 1865 *Ex parte* Banfield.

a debtor from custody, the Court would consider the certificate of registration *primâ facie* evidence of the due execution of the deed.

I am informed that Mr. Justice *Shee* thought that the certificate was *primâ facie* evidence that a sufficient proportion of creditors had assented to the deed, and had no other evidence before him. Whether that was right or not is not a question before me; but I think that if the requirements of the 192nd section are not complied with, there is nothing to deprive a non-assenting creditor of his ordinary legal rights, and that no leave is required to enable him to enforce them. It can only be required for the purpose of facilitating their enforcement.

If the creditor had shewn on that application that the requisitions of the 192nd and 200th sections of the Act of 1861 had not been complied with, then the Judge would not have discharged the debtor, because there would have been nothing to bar the legal rights of the creditors.

I think that the Deputy-Commissioner has, in this case, exercised a sound discretion, and that, after all the proceedings which have taken place, it would be wrong to give this creditor any facilities for setting up his legal rights, and so disturbing all that has been done towards the distribution of the estate.

Solicitors for the Appellant: Messrs. *Wilkins & Co.*

L. C. 1866 *Jan.* 25.

In re PENTON.

Bankruptcy—Trust Deed—Unliquidated Damages.

Section 153 of the *Bankruptcy Act*, 1861, enabling a creditor to have unliquidated damages assessed, applies to arrangements by deed as well as to bankruptcies.

Where a creditor has proceeded at law against the debtor after the registration of a trust deed, and has recovered damages, he will not be allowed to come in under the trust deed and have the damages assessed under section 153.

2 C P 450-9 460, 2 Ex 396-7, 1 Ch 797, 802-5, 2 h 46, 38 L J 71-2,

PENTON, the debtor in this case, had entered into a contract with one *Townsend* for the purchase of some land, and had failed

in completing it. In January, 1865, *Townsend* brought an action for damages against *Penton*. On the 11th of March *Penton* executed a deed of arrangement with his creditors under the *Bankruptcy Act*, 1861, and the deed was duly executed, and was registered on the 31st of March. The deed contained no release to *Penton*. *Townsend* still proceeded with his action, which was tried on the 2nd of April, and he obtained judgment on the 8th of April for £422.

Penton was afterwards made a bankrupt on his own petition, and was opposed by *Townsend* on his application to be discharged.

In November, *Townsend* served the trustees of the deed with notice of an application to the Commissioner to direct the damages for the breach of contract to be assessed by a jury either before the Commissioner or in a court of law. The Commissioner refused to make the order, and *Townsend* appealed.

Mr. *Little*, in support of the appeal, said that two objections had been taken. 1st. That section 153 of the Act of 1861, under which the application was made, did not apply to trust deeds, but only to bankruptcies; but section 197 provides that, after the registration of the deed, all matters relating to the estate shall be subject to the jurisdiction of the Court of Bankruptcy, in the same or like manner as if the debtor had been adjudged bankrupt: *Ex parte Halliday* (1). 2ndly. That the creditor had proceeded with his action; but he had done nothing to affect his rights, and did no harm by going on with the action. No execution had been issued on it, and the trustees of the deed were not affected by it. The creditor now came to ask to have his damages assessed as provided by section 153, which was entirely a new enactment. The debt still existed, and he had done nothing to destroy his rights as they existed at the time of the registration of the deed.

Mr. *Reed*, for the trustees of the deed:—

The creditor's claim was for unliquidated damages, and instead of proceeding under section 153, he makes his election to go on

(1) 2 D. J. & S. 312.

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against the person of the debtor, probably because the deed contains no release, and taking his chance of what he might recover. There are now no unliquidated damages; that claim is extinct by the judgment, the breach of contract no longer exists, and section 153 does not apply.

Then does section 153 apply to trust deeds? It cannot be argued that section 197 includes everything, such as the choice of assignees, &c., and we contend that it does not include this section; if that had been the intention, it would have been more clearly expressed: *Ex parte Mendel* (1).

Mr. *Little*, in reply.

LORD CRANWORTH, L.C., after stating the facts, continued:—

The question is as to the right of Mr. *Townsend* to come in at the present moment under the trust deed in respect of damages, or what shall be ascertained as damages under the Act of 1861.

Two doubts have been raised. The first was, whether section 153 of the Act of 1861 applies to the case of deeds as well as to the case of bankruptcies. Upon that I have no doubt; I think that it comes within the provisions of section 197. It was argued that that cannot be taken in its integrity, as there are many matters, such as the choice of assignees, and so forth, which are not found in the case of deeds; but that does not weigh on my mind, because what was meant is that, in administering the estate under such a deed, the principles of administration in bankruptcy shall apply: if there are any regulations which relate to the mere machinery, they will not apply. This, however, is matter of principle, and I make no doubt that this section applies to arrangements under deeds as well as to bankruptcies.

His Lordship then said, that what induced him to think that the Commissioner had come to a correct conclusion was this: On the 31st of March it was competent to Mr. *Townsend* to say that he would come in under section 153. His Lordship would be reluctant to say that Mr. *Townsend*, by having gone on for a few days with his action in ignorance of the deed, would be prevented from coming in under the deed, but here his conduct had put it beyond doubt. He was not bound to come in under the deed.

(1) 1 D. J. & S. 330.

He might say that he believed that the bankrupt would pay out of some estate which was coming in to him, and that he therefore chose to have execution against the debtor. In fact, there appeared to have been an application by *Townsend* in the bankruptcy. He had chosen to proceed and convert his contingent claim for damages into an ascertained amount, and he had a right to go in under the subsequent bankruptcy and take what he could get. The Commissioner appeared to be right, and the appeal must be dismissed.

L. C. 1865 *In re* PENTON.

Solicitor for the Appellant: Mr. *W. Moon.*

In re AGRICULTURIST CATTLE INSURANCE COMPANY

L. C. 1865 Dec. 21, 22. Jan. 12, 1866

STANHOPE'S CASE.

Public Company—Forfeiture of Shares—Lapse of Time—Contributory—Notice to Shareholders.

The directors of a company made an arrangement with a shareholder who wished to retire from the company, that on payment by him of a sum of money, his shares should be declared forfeited for non-payment of a call which had been made. The money was paid and the shares transferred to the company. Twelve years afterwards the company was wound up, and two years after that an application was made to place the shareholder on the list of contributories:—

Held, reversing the decision of the Master of the Rolls, that the shareholder ought to be placed on the list, as the arrangement was not within the power of the directors, and was a fraud on the other shareholders.

The shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty.

THIS was a motion to place the Honourable Mrs. *Stanhope*, as executrix of the Honourable *F. H. R. Stanhope*, on the list of contributories to the *Agriculturist Cattle Insurance Company* in respect of 100 shares of £20 each.

This company was formed in the year 1845, and Mr. *Stanhope* then became a shareholder, and signed the deed of settlement for 100 shares, and paid £1 a share on each. In 1847 he received a dividend, and in 1848 he paid further calls of £1 and 10s. on each

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of the 100 shares. The company was then in difficulties, having lost £17,000 beyond its paid-up capital, and several shareholders wished to retire from it. Accordingly, in November, 1848, an arrangement was made called the "*Chippenham* Compromise," under resolutions passed at a meeting of the shareholders, that a nominal call of £4 a share should be made; that those shareholders who wished to leave the company should pay sums varying according to the number of their shares from £1 to £2 10*s.* a share on that call, and that thereupon their shares should be forfeited for non-payment of the call; and that those shareholders who wished to remain in the company should pay 10*s.* a share in respect of this call. The particulars of this compromise will be found in the report of *Brotherhood's Case* (1), and are stated in the judgment of the Lord Chancellor in the present case. The following clauses in the deed of settlement relate to the subject:—

The 125th clause provided that, upon the neglect or refusal of any holder or holders of any shares for the time being in the company to pay any instalment or subscription which might be called for or in respect thereof, then "it shall be lawful for the Board of Directors, by notice in writing under their hands delivered or sent by post to such shareholder, to his or her executors, administrators, or assigns, to declare that the share or shares in respect whereof there shall be such neglect or refusal, and all money paid to the company thereon, and all benefit and advantage whatsoever attending the same, shall thenceforth be forfeited to the company, in which case such forfeiture shall take place accordingly." And by the 198th clause, power was given to the directors to compromise any action or suit against any shareholder on account of his refusal or neglect to perform any of the provisions of the deed.

Many shareholders paid money according to the terms of the *Chippenham* Compromise, and had their shares forfeited at once, as arranged; but Mr. *Stanhope* was one of those who paid the 10*s.* a share, and remained. Afterwards, however, he also wished to retire; and at a meeting of the directors, held on the 15th of August, 1849, the following resolution was passed:—"It is ordered that, on certain arrangements being completed, the shares of the Hon. and Rev. *Fitzroy Stanhope* be cancelled, the calls in

(1) 31 Beav. 365.

arrear not being paid." On the 21st of August, 1849, Mr. *Stanhope* wrote a letter to the directors as follows:—"I hereby undertake, for myself, my heirs, executors, administrators, and assigns, to do no act or cause no step to be taken at any time hereafter for the purpose of reinstating my name on the register of the *Agriculturist Cattle Insurance Company* as the owner of 100 shares lately forfeited in consequence of non-payment of calls." On the 3rd of September, 1849, Mr. *Stanhope* paid 100*l.* to the company, and the following entry was made in the books:—"Capital account. Hon. *F. Stanhope*, proportion of liability on forfeiture of shares, 100*l.*" In the journal of the company, under the date of the 31st of December, 1849, is an entry: "Cancelled shares. For sundry shares cancelled, and portions of the 4*l.* call remitted thereon, Hon. *F. Stanhope*, 100 shares, 250*l.*" In the share transfer book, under the date of the 5th of September, is registered a transfer of the 100 shares from Mr. *Stanhope* to the company; and a return to the same effect was made to the registrar of joint-stock companies. Several other shareholders at the same time made similar arrangements with the directors.

Mr. *Stanhope's* name never afterwards appeared in the list of shareholders, and no further notices were sent to him from the company. The 100*l.* appeared to form part of the balance of 10,350*l.* 10*s.* 10*d.*, as shewn in the balance-sheet of the company for 1850. Nothing further material appeared in the books of the company or among Mr. *Stanhope's* papers, and he, the directors, and solicitors concerned, were all dead.

The company went on for some years longer, but with many changes in its constitution, and on the 20th of April, 1861, it was ordered to be wound up.

Mr. *Stanhope* died in 1864, and an application was made before the Master of the Rolls to have the name of Mrs. *Stanhope*, the executrix, included in the list of contributories. The Master of the Rolls, on the 4th of November, 1865, refused the application, saying (as reported in 14 W. R. 42) that he had quite made up his mind on the subject, which he had often had to consider. He was unable to distinguish this case in substance from Lord *Belhaven's Case* (1); he was also unable to distinguish it from

(1) 11 Jur. (N.S.) 572.

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Spackman's Case (1); but, at the same time, he approved of the decision of the Lords Justices in *Lord Belhaven's Case*, and he disapproved of Lord *Westbury's* judgment in *Spackman's Case*. He could not reconcile the two, therefore he should, in the present case, follow his own opinion in both those cases, and hold that the executrix of Mr. *Stanhope* was not a contributory. It was a very desirable thing that the law should be settled one way or the other; and, in order to make it certain that the official manager would appeal, he would dismiss the summons with costs. It seemed to him a monstrous thing that when shares had been cancelled by the directors under an arrangement of this sort, and they had taken money for so doing, it should be said, after the lapse of all these years, to be a fraud to which lapse of time is no bar, though the fact that the person whose shares were cancelled was no longer a member of the company was duly registered, which was the only notice that could be given of the matter.

The official manager appealed.

Sir *H. Cairns*, Q.C., and Mr. *Bush*, for the official manager, referred to *Ex parte Spackman* (2), *Brotherhood's Case* (3), *Spackman's Case* (4), *Belhaven's Case* (5). In this case there was, in fact, no call in arrear; moreover, that would not cause a forfeiture, unless *bonâ fide*. What are his shares forfeited for? for paying 100*l*. *Lawes's Case* (6), *Ex parte Spackman* (7), *Bennett's Case* (8), shew that, to leave a company, the proper forms must be followed.

Mr. *Hobhouse*, Q.C., and Mr. *J. Pearson*, for Mrs. *Stanhope*:—

There was perfect *bona fides* on our part, and perfect regularity on both sides. No fraud appears on the books or anywhere, and therefore, and after this lapse of time, everything must be presumed in our favour: *Munt's Case* (9). If Mr. *Stanhope* had gone out under the *Chippenham* Compromise, he would have had to pay 200*l*. As it was, we have proved that he paid 150*l*., and it is by no means

(1) 11 Jur. (N.S.) 207.
(2) 1 Mac. & G. 170.
(3) 31 Beav. 365; and on appeal, 8 Jur. (N.S.) 926.
(4) 10 Jur. (N.S.) 911; on appeal, 11 Jur. (N.S.) 207.
(5) 12 L. T. (N.S.) 324; on appeal, 12 L. T. (N.S.) 595; 11 Jur. (N.S.) 572.
(6) 1 D. M. & G. 421.
(7) 1 De G. & Sm. 599.
(8) 5 D. M. & G. 284.
(9) 22 Beav. 55.

clear from the books that he did not pay more. The company should not have waited till every one who knew any thing about it was dead. Mr. *Stanhope* thought that he was clear of the company; and during twelve years all sorts of changes have taken place in the constitution and management of the company, which he, and the others who retired with him, had no voice in, and might have objected to most strongly. In *Spackman's Case* there was wilful fraud and concealment; there is none here; and the directors had power to forfeit shares for calls really in arrear, as these were. There was no limitation of the time within which a shareholder might adopt the *Chippenham* Compromise, and, as in creditors' deeds, he might come at any time: *Whitmore* v. *Turquand* (1). There were continual changes of shares. In 1848 there were 13,100; in 1849, 4908; in 1850, 4601; and the other shareholders must have known of this, and that shares were continually cancelled. Moreover, they could have ascertained it from the published balance-sheets. Could Mr. *Stanhope* have come back if the company had been prosperous?

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Mr. *Bush*, in reply.

Jan. 12. LORD CRANWORTH, L.C., after briefly stating the facts of the case, continued:— 1866

Several cases have arisen under the winding-up order in this same company. First, there was *Brotherhood's Case* (2) before the Master of the Rolls, the circumstances of which were somewhat unusual. The company having been formed in 1845, in 1848 a great many of the shareholders were anxious to retire from the company. A general meeting of the shareholders was accordingly held on the 2nd of November, 1848, at which terms were discussed as to how the shareholders who wished to retire should be enabled to retire, and a certain mode was proposed, the substance of which was that a large call of £4 per share should be made (which was to include a previous informal call of £1), and any shareholder desiring to retire was to be called upon to pay a certain portion only of that call—larger by those who had a small number of shares, smaller by those who had a large number of

(1) 1 J. & H. 296; on appeal, 3 D. F. & J. 107.
(2) 31 Beav. 365.

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shares—and those who did not wish to retire were only to pay 10s. instead of the £4, and they were to continue in the company. That arrangement was made at a meeting at *Chippenham*, and has always been called the "*Chippenham* Compromise." Circulars were sent to all the shareholders, stating those terms, and telling them that they might retire if they accepted those terms on or before the 13th of November, at which time there was to be an adjourned meeting. *Brotherhood* and several others accepted these terms, and made the payments accordingly, and were never afterwards treated as shareholders. They had no notices sent to them afterwards, and they received no dividends, if there were any. In order to make the arrangement complete, and, I suppose, legal, the shares were declared to be forfeited, and were assigned to paupers, in fact, to get rid of them. This transaction having taken place at the end of 1848, in 1862, after the winding-up order, a motion was made to place the name of Mr. *Brotherhood*, and the names of the others who were with him, on the list. The Master of the Rolls, after such a lapse of time, refused to make any such order, and the Lords Justices, on appeal, concurred with the Master of the Rolls. The Lord Justice *Turner* made an observation which was entitled to great weight: "that after such a lapse of time, the whole of the circumstances having been communicated to two consecutive meetings of the shareholders, and the names having been all struck out, he should have no difficulty as a juryman in inferring, as a matter of fact, that every one of the shareholders knew of it, and assented to it." But whatever was the ground of their decision, the Lords Justices thought that the Master of the Rolls was right.

The next case was *Spackman's* (1). He was also one of the original shareholders, and he declined to come in under the *Chippenham* Compromise, but early in the year 1849 he presented a Petition for winding up the company. That Petition was, however, dismissed, and thereupon he and six other shareholders, who were also anxious to get out of the company, entered into a negotiation with the directors in order to try whether they could not get released upon terms similar in character to those which constituted the *Chippenham* Compromise. Eventually, after some negotiation,

(1) 10 Jur. (N. S.) 911; on appeal, 11 Jur. (N. S.) 207.

it was stipulated that these seven shareholders should pay to the directors a sum of £4000, and that thereupon their shares should be declared forfeited as for failure in paying the *Chippenham* call, and that their shares should be then assigned away, and that they should be thereby released from all further connection with the company. That was carried into effect; but that transaction, unlike the transaction of Mr. *Brotherhood*, was never brought before any general meeting. An application was made to the Master of the Rolls in the summer of 1864 to place Mr. *Spackman's* name on the list of contributories, on the ground that he had never validly ceased to be a shareholder. The Master of the Rolls heard the subject argued at great length, but he refused the application chiefly in consequence of the great lapse of time and the alterations that had been made in the company, and in the amount of the shares, after *Spackman* had practically ceased to be a member. From that judgment there was an appeal to Lord *Westbury*, who reversed the order of the Master of the Rolls, and placed Mr. *Spackman* on the list.

After that case came another application to place on the list the name of Lord *Belhaven* (1). Now, Lord *Belhaven* stood in a different position from either *Brotherhood* and those who were with him, or *Spackman* and those who were with him, for he had never executed the deed, and he repudiated all liability; and after a good deal of discussion had taken place between the directors and those who acted for Lord *Belhaven*, the directors at last agreed to accept £50, and release him from all further liability. That was in 1855, and nothing more was heard of it by Lord *Belhaven* until an application was made after the winding-up order, and after what was decided as to the other shareholders, to place Lord *Belhaven* on the list. The Master of the Rolls, to whom the application was made, was of opinion that Lord *Belhaven* ought not to be placed on the list; but he considered that as *Spackman* had been placed on the list, Lord *Belhaven* must be. That case was carried by way of appeal to the Lords Justices, who heard it in the month of June, 1865, and struck him off the list, not because they thought the decision in *Spackman's Case* was wrong, but because he stood on a different footing from all the others. Rightly or wrongly,

(1) 12 L. T. (N.S.) 324; on appeal, 12 L. T. (N.S.) 595; 11 Jur. (N.S.) 572.

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certainly honestly thinking himself not a shareholder, he denied all liability; and what the Lords Justices said was, that by one of the terms of the deed there was an express power given to the directors to compromise any suits with persons with whom they were in litigation, and that there was no question that they acted perfectly *bonâ fide*, and did release Lord *Belhaven*, because they thought it was a doubtful matter whether they had any claim against him. That was the ground on which the Lords Justices acted in striking off Lord *Belhaven's* name.

Then came the present case. [His Lordship stated the facts of this case, and then said:—]

The case then came before me by way of appeal, and was very fully argued shortly before the Christmas holidays. It appears to me impossible to find any distinction between this case and that of *Spackman*. In this case, as in that of *Spackman*, the shareholder refused to retire under what is called the *Chippenham* Compromise, supposing that could be validly done. In both cases the real arrangement was a release by the directors in consideration of a sum of money paid by the shareholder. The machinery used in both cases was a forfeiture, which I must call a pretended forfeiture of shares on account of non-payment of a call, and in neither case was the truth disclosed to the body of shareholders at large. Lord *Westbury* evidently bestowed great care on the case, and the terms of his prepared judgment leave no doubt as to the grounds of his decision.

[His Lordship then read part of the judgment of Lord *Westbury* in *Spackman's Case*, and continued:—]

Now when the present case came before the Master of the Rolls, I think I may assume from his Lordship's language that if Lord *Belhaven's Case* had not been decided as it was by the Lords Justices, he would have felt bound by the decision of Lord *Westbury* in *Spackman's Case*. But thinking that the two cases were in conflict, his Lordship acted on what he considered the sounder view of the law. I own, however, that I cannot think there is any such conflict. In Lord *Belhaven's Case* there was no concealment; there was not, as Lord *Westbury* considered there was in *Spack-*

man's case, *aliud simulatum aliud actum*. There was a *bonâ fide* question whether Lord *Belhaven* ever was liable as a shareholder, and the Lords Justices, carefully distinguishing his case from *Spackman's*, decided that under one of the clauses of the deed the directors had the power of compromising disputed claims, and that, acting on that power, they had validly compromised the dispute with Lord *Belhaven*, and that he was validly released. The decision, therefore, rested on grounds which are altogether absent in the present case, as they were in *Spackman's Case*.

I should feel myself bound by that decision, even if I did not think the reasoning on which it rested sound. But it is due to the parties interested in the affairs of this company to say, that my decision in the present case would have been the same, even if I had not felt the decision in *Spackman's Case* to be a binding authority. I do not impute to Mr. *Stanhope* moral fraud in the course he took—an imputation from which it is less easy to exonerate the directors. But Mr. *Stanhope* by executing the deed of settlement came under obligations to all his fellow shareholders from which, without their consent, he could not be relieved. The directors could only bind the shareholders by acts coming within the scope of the authority delegated to them by the deed, and the releasing of shareholders was not within those powers. It is true that by the 125th clause the directors had the power of declaring forfeited the shares of any shareholder neglecting or refusing to pay his calls. But this obviously, looking to the context, refers to a case where the directors are unable to obtain payment of the call. It was not intended to supply them with machinery whereby, under the pretence of forfeiture, they should be able to deprive the continuing shareholders of the liability of all those for whose joint liability with themselves they had originally stipulated. That such a proceeding could not have been supported, if questioned at the time it originally took place, was hardly contested. But if so, lapse of time makes no difference, for there is nothing to shew that any of the other shareholders, still less that all of them, were aware of what had been done. It is said that by examining books and accounts open to their inspection, and consulting the lists of shareholders as published from time to time, any shareholder might have discovered the truth. This is not to my apprehension

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very clear; but even supposing it to be so, that is not sufficient. It is no part of the duty of a shareholder to look into the management of the business. He has a right, acting on the terms of the deed, to leave the management in the hands of those to whom he had confided it, and to assume that they are doing their duty. It is not enough to shew that they might have become acquainted with the mismanagement of their affairs. It must be shewn that they did so.

On these grounds, fully acting on and adopting the view taken by Lord *Westbury* in *Spackman's Case*, I am of opinion that the order of Lord *Romilly* must be discharged, and that the name of Mrs. *Stanhope*, as executrix of her late husband, must be placed on the list of contributories in respect of 100 shares of £20 each. Mrs. *Stanhope* must refund any costs which she has received under Lord *Romilly's* order.

Solicitors for the official manager: Messrs. *Horn & Murray.*
Solicitors for Mrs. *Stanhope*: Messrs. *Dobinson & Geare.*

L. C. 1866 *Jan.* 24.

In re CARTER.

Bankruptcy—Suspending Proceedings—Equitable Mortgagee.

Where the proceedings in a bankruptcy have been suspended by resolutions under section 116 of the *Bankruptcy Act*, 1861, and there is nothing in the resolutions to preserve the jurisdiction of the Court of Bankruptcy, its jurisdiction to order a sale on the Petition of an equitable mortgagee is gone.

THE bankrupts, *W. Carter* and *C. J. Justin*, were traders, and at a meeting of their creditors held on the 1st of June, 1864, it was agreed that the creditors would take for their debts bills of exchange accepted by *Carter*, who would also deposit by way of security the title-deeds relating to separate estate of his, and the deeds were accordingly deposited with the *Sheffield Union Banking Company*. Several of the bills remained unpaid, and on the 6th of March, 1865, *Carter* was adjudicated bankrupt, and *Justin* on the 7th of March; and, by an order of the Court, *Justin's* bankruptcy was annexed to *Carter's*. A meeting of the creditors was held on the 22nd of March, at which creditors' assignees were ap-

pointed, and a resolution was passed that no further proceedings should be taken in bankruptcy, and at the subsequent meeting held, as provided by the 110th section of the *Bankruptcy Act*, 1861, it was resolved that the proceedings in bankruptcy in reference to the said bankrupts should be suspended, and that the *joint estate of the bankrupts and the separate estate of Justin* should be wound up and administered by *H. Roberts*, one of the creditors' assignees; that the separate creditors of *Carter* should accept a composition of 6*s.* in the pound, and that a composition deed should be prepared and executed by *Carter*, and thereupon his separate estate should be reconveyed to him; that all questions and disputes which might arise in the course of such winding up and administration *as aforesaid* between the assignee and any creditor, or other person, should be referred to the Court of Bankruptcy in London; and other resolutions were passed as to the estates. A deed of composition, dated the 11th of May, 1865, was accordingly executed, by which *Carter* covenanted to pay a composition of 6*s.* in the pound, but the deed contained no release to him, and no reconveyance of his estate had been executed. The deed was not registered under the 194th section, as the debtors were bankrupts.

On the 11th of August last a Petition was presented to the Court of Bankruptcy by *Hugh Wood*, the public officer of the *Banking Company*, and others, praying a declaration that they might be declared equitable mortgagees in respect of the amounts due on the bills, and that *Carter's* interest in the property might be sold, and the proceeds applied in payment of the costs and of the money due to the equitable mortgagees.

The Petition was heard before Mr. Commissioner *Winslow*, who dismissed the Petition, delivering judgment to the following effect, after stating the circumstances, and disposing of certain other objections which had been raised :—

"Three questions present themselves upon these resolutions. 1st. Has this Court any jurisdiction to hear and determine a Petition such as the present in a bankruptcy where the proceedings are suspended by the creditors? or is it deprived of jurisdiction except as to the discovery of the estate, and the order of discharge, which are expressly reserved by the words of the 110th

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section? 2ndly. Can the creditors, by any resolution that they may come to, confer on the Court, or rather leave with the Court, such portion of its existing jurisdiction as they may think fit, and if so, have they done it in the present instance? 3rdly. Does the deed of composition come within any of the sections of the *Bankruptcy Act*, 1861, and confer upon this Court any jurisdiction to make the order asked by the Petitioners?

"I do not think it necessary to enter upon a consideration of the second question further than this—it appears that if the creditors might resolve to leave the jurisdiction with the Court, they have not done so by the resolutions. The questions and disputes which by the resolutions may be referred to the decision of this Court, are those which may arise respecting the joint estate and the separate estate of *Justin*, and the subject-matter of the present Petition is part of the separate estate of *Carter*. If *Carter* were not a bankrupt, this Court would have no right to entertain the Petition of a creditor who claimed to be the equitable mortgagee of a part of his estate, and to order it to be sold; and the same is the case if the jurisdiction over the separate estate of *Carter* is gone.

"Then, has the Court jurisdiction by virtue of the deed? The deed does not come within the 188th section or the 197th section, and any jurisdiction must be conferred by the 136th section.

"Notwithstanding that the deed has not been registered, this Court has a certain jurisdiction conferred upon it by the deed in question; at least, with great deference to contrary opinions which have been expressed, that is the conclusion to which I have come. But does this Petition refer to a dispute between parties claiming under the deed of composition? If the Petitioners were creditors asking for a composition they would be claimants under the deed, and the Court could determine any question between them and other claimants; but it is clear that, without the assistance of this section, the Petitioners, who are not separate creditors of *Carter*, could never claim anything under the deed; and yet such a claim is necessary to bring them within the section. I think that the Petitioners are not parties claiming under the deed within the section.

"Unless, therefore, the Court retains the jurisdiction it pos-

sessed by virtue of the Act of Parliament, notwithstanding the resolutions of creditors to suspend the proceedings in the separate estate of *Carter*, the Petitioners have no remedy in this Court.

"There is much to be said in favour of this proposition. The Court, by virtue of the 12 & 13 Vict. c. 106, is to hear and determine and make orders in any matters of bankruptcy, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate and effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue or under colour of the bankruptcy, and also in any matter, whether in bankruptcy or not, where the Court by virtue of the Act has jurisdiction over the subject-matter of the Petition. The 89th section enables the Court, after the filing of a Petition for adjudication, to order the property of the bankrupt to be sold for the satisfaction and payment of his creditors; and the 151st section enacts that the assignees shall be subject to the orders of the Court in their character of assignees; and it may be fairly contended that, though creditors are entitled to devise a new and more convenient manner of payment and satisfaction out of the bankrupt's estate than the ordinary course of proceeding in bankruptcy, yet the Court is not deprived of its jurisdiction over the assignees and the estate, and is to see that payment and satisfaction are made. The 136th section, too, of the Act of 1861, appears to refer to cases of resolutions like the present, and even to imply the power to set them aside if unjust or unreasonable.

"The same necessity must exist under the new manner of administration by the creditors, as under the bankruptcy, for a tribunal to decide the questions which must arise; and it appears improbable that the Legislature intended to confer on this Court the jurisdiction over the debtor, the trustees, and the creditors under all deeds of arrangement or composition, and at the same time to take away the jurisdiction it has always possessed over the estate of the assignees and the creditors of the bankrupt.

"There is, however, an express decision to the contrary, by one of my brother Commissioners: *Ex parte Hastings, In re Walker* (1);

(1) 11 L. T. (N. S.) 160.

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and the question is much too doubtful for this Court to assume jurisdiction until that decision has been overruled by a superior Court; and it is most desirable that a judicial interpretation of the meaning of this part of the 110th and 136th sections should be obtained from the Court of Appeal; and I hope the Petitioners and assignees will think it consistent with their duty to seek it. In the present case I must dismiss the Petition."

The Petitioners appealed.

Mr. *Sargood*, in support of the appeal.

Mr. *Daniel*, Q.C., and Mr. *Reed*, for the assignees.

Mr. *Sargood*, in reply :—

It would be most inconvenient that the jurisdiction of the Court should be gone, as the mortgagees will then be compelled to file a bill, as they would have been before the Act of 1849. The question is, whether you are at liberty to substitute for the word "proceeding," the "jurisdiction." It is not true that the jurisdiction is gone because the bankruptcy is gone, or else the Legislature would have said that the bankruptcy was to be annulled.

LORD CRANWORTH, L.C., said, that it was clear that in this case there could be no relief given through the Act irrespective of the provisions of the deed. Here it was contended that, notwithstanding the resolutions and the deed, there still remained jurisdiction in the Court to order a sale of property under an equitable deposit of deeds. That, however, was a construction which his Lordship could not put upon it. He thought the word "proceeding" was less extensive than the word "jurisdiction," and was advisedly used. The Legislature said, that if a majority of creditors chose to say that no further proceedings should be taken in bankruptcy, and should also so resolve in an adjourned meeting, then the proceedings in bankruptcy should be suspended, and the estate and effects wound up.

He thought that, if the section had stopped there, there would have been great difficulty in finding out what was the meaning of the word "suspended;" but it was explained by what followed, "and the bankrupt, having made a full discovery of his estate,

should be entitled to apply for an order of discharge." The Legislature did not intend that anything should be done which would prejudice the bankrupt, and therefore the section goes on to say, that everything relating to the bankruptcy has come to an end, but the bankrupt shall be enabled, having given discovery, to pass his examination and have his discharge. There is nothing unreasonable in this; for if the creditors wished to guard themselves against it, they might have provided against it by their resolutions. It is unfortunate, but I cannot say that the decision is not correct. The appeal must be dismissed.

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Solicitors for the Petitioners: Messrs. *Maude & Attwood.*
Solicitors for the Assignees: Messrs. *Reed & Phelps.*

In re GRAHAM.

L. C. 1865 *Nov.* 23; *Dec.* 6, 9.

Bankruptcy—Allowances to Official Assignees.

The salary paid to the official assignees under the *Bankruptcy Act*, 1861, includes all remuneration to them for duties performed under the *Winding-up Acts* and similar Acts.

The official assignees are not entitled to retain the remuneration under the *Bankruptcy Act*, 1849, in respect of duties performed after the 11th of October, 1861, in bankruptcies which occurred before that date.

The Court is not precluded from opening accounts which have been passed by the Commissioner.

Sums of money which cannot be appropriated to any particular bankruptcy may be paid to the unclaimed dividend account.

The official assignees cannot retain small sums of money (although it may be very probable that those sums would be found due to them) without the regular investigation of the accounts.

THIS was a motion by the *Attorney-General*, on the relation of the Chief Registrar in Bankruptcy, calling upon *G. J. Graham*, one of the official assignees of the Court of Bankruptcy in London, to pay to the account of the Chief Registrar the sum of £1663 7*s.* 11*d.*, and to the unclaimed dividend account in Bankruptcy the sum of £578 19*s.* It appeared that £2 14*s.* 9*d.*, part of the £1663 7*s.* 11*d.*, was a mistake, and that sum is called £1660, all shillings and pence being omitted in this report.

L. C. 1865 *In re* GRAHAM.

By section 44 of the *Bankruptcy Act*, 1849, it was enacted, "That the Court may order and allow to be paid out of any bankrupt's estate to the official assignee thereof, as a remuneration for his services, such sum as shall, upon consideration of the amount of the bankrupt's property, and the nature of the duties performed by such official assignee, appear to be just and reasonable."

Under that section, a scale of remuneration was framed, and remained in force, with some small alterations, up to the time of the passing of the Act of 1861, section 31 of which enacts that, "the fees to be taken by official assignees in respect of the duties performed by them shall be defined by general orders. Each official assignee shall make a return half-yearly to the chief registrar, in such manner as general orders shall direct, of the amount of fees received by him during the six months preceding the date of such return. Each of the present official assignees of the *London* district shall receive an annual salary of £1200;" and it was further enacted, that "all such salaries shall be paid out of the moneys standing to the chief registrar's account, and shall be exclusive of such proper remuneration actually paid to necessary clerks, and of such reasonable office expenses as shall respectively be allowed by the Court. The official assignees shall not be entitled to any further remuneration in respect of any duties performed by them."

By section 230 it was enacted that the Acts and parts of Acts therein specified, and all other Acts or parts of Acts which were inconsistent with this Act, should be repealed; but such repeal should not affect any proceeding pending, or any right that had arisen or might arise, or any penalty incurred in respect of any transaction, act, matter, or thing done or existing prior to this Act, under or by virtue of any of the Acts or parts of Acts repealed.

By section 232 it was enacted that the Act should come into operation on the 11th of October, 1861.

Pursuant to the 31st section, a general order was issued on the 22nd of February, 1862, whereby it was ordered that "every official assignee shall, on the 11th of April next, and the 11th of October next respectively, make a return to the chief registrar, in a form to be furnished by him, of the amount of fees received by

him, according to the scale in force at the time of passing the *Bankruptcy Act*, 1861, as far as applicable during the six months preceding the date of such return, and shall verify the same by oath, distinguishing the amount received in each bankruptcy, and under the different heads in the scale, and, after deducting such remuneration actually paid to necessary clerks, and such reasonable office expenses as shall respectively be allowed by the Court, shall pay over the surplus to the credit of the chief registrar's account."

On the 7th of March following, a circular letter was sent by the chief registrar to each official assignee, giving him the form in which he was to make his return, and calling his attention to the fact that he was to return all fees and allowances received in respect of anything done or any duty discharged under any bankruptcy since the 11th of October, 1861, whether the adjudication took place before or subsequent to that time.

An investigation into the accounts of the official assignees was instituted in 1865, and Mr. *Graham* amongst others was charged with the sum of £2950, which would be reduced by allowances and payments as hereinafter mentioned to £1660, and with the further sum of £579, which are the two sums mentioned in the notice of motion.

The sum of £2950 was made out of the following items :—

1. £940 which had not been included in the returns made by him, and which he claimed as having been received by him as remuneration or fees for work done by him, not in bankruptcy, but as official liquidator under the *Winding-up Acts*, and as trustee under 7 & 8 Vict. c. 70. It was, however, disputed whether the whole of this £940 had been earned in this way.

2. £2010 which had been received by him for work done in bankruptcies which had occurred prior to the 11th of October, 1861. The accounts in these bankruptcies had been examined by Mr. *Harding*, an accountant, and the Attorney-General proposed to allow to Mr. *Graham* in respect of them (*a*) £328 as wholly earned by him before 11th of October, 1861; (*b*) £396 as being a fair proportion of fees earned partly before and partly after the 11th of October, 1861; (*c*) £401 which had been paid by Mr. *Graham* to the account of the Chief Registrar, as hereinafter mentioned;

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and (*d*) £164 which came under another head hereinafter mentioned. These four sums being deducted from the £2010, left a balance of £720, which, added to the £940, made up the £1660 claimed by the notice of motion.

This £720 Mr. *Graham* claimed in addition to the sums allowed him in respect of bankruptcies before the 11th of October, 1861, as he contended that these bankruptcies did not come under the Act of 1861, and that he was entitled to the whole of the fees on them. This claim had been "sanctioned and allowed" by the Commissioner for six successive half years, with a deduction from the whole sum so earned by Mr. *Graham* of 20 per cent. in each half year for the use of clerks and office expenses under the new regulations. On the passing of the first of these accounts the Commissioner appended a note that this was the "simplest mode." This percentage on the £2010 was the £401 which had been paid to the account of the Chief Registrar as above mentioned. Mr. *Graham* also claimed a larger allowance than (*b*) £396 in respect of fees earned partly before and partly after the 11th of October.

The sum of £579 was made up as follows:—

1. A sum of £96 arising from the sale of a quantity of books and papers relating to old bankruptcies. This sum has since been paid by Mr. *Graham*.

2. The £164 above mentioned, arising from fees and allowances received on account of old estates since the 11th of October, 1861, and never audited or sanctioned by the Commissioner. These were mostly very small sums, from 1*s*. to £5, and Mr. *Graham* alleged that he would be entitled to retain them if the accounts were audited, and that, in many instances, a larger sum was due to him from the same estates, but that the expense of auditing would far exceed these sums.

3. £319 arising from similar services since the 11th of October, 1861.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Sargood*, and Mr. *H. B. Miller*, for the motion.

Sir *H. Cairns*, Q.C., and Mr. *Bagley*, for Mr. *Graham*.

The *Attorney-General*, in reply.

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Dec. 9. LORD CRANWORTH, L.C., after stating the clauses in the Acts, and the orders as above stated, continued:—

Then this question arose—How were fees and remuneration to be dealt with in respect of bankruptcies pending at the passing of the Act? Now, what was considered to be the fair mode of dealing with such sums was this: that the official assignee should be allowed to retain all sums which had been actually earned before the Act came into operation, notwithstanding the provision that the official assignee was, after the 11th of October, 1861, to receive nothing but his salary. It was considered that, taking into account the fact that he had already earned these fees, the 230th section might be considered to have saved and reserved to him everything that he had earned up to that time, though it was not paid until afterwards, so that he might still receive and take these sums to his own use, in addition to his salary. Then it was said that there were some fees which were partly earned before and partly after the Act. What was done with respect to them, whether right or not is not now in question, was this: it was said that where anything was partly earned before and partly after, in respect of that a fair apportionment must be made, and that so much as had been earned before should be treated as matter which had actually belonged to him, and that, therefore, he might keep it in addition to his salary, and that so much as had been earned after must be paid into Court like the rest of the remunerations and fees which he had received. I do not go into the question whether that was perfectly right or not.

[His Lordship then went into the accounts, and said that there remained a question as to £1660.]

Part of this, amounting to £940, arose in respect of sums which he had received—as official assignee, it is true—but not strictly for his duties as an official assignee, but as performing certain other statutory duties imposed upon him under the *Joint Stock Companies Act* as official liquidator, or under a prior Act as a trustee in winding up insolvent estates. If that had been accurate, and that sum of £940 was so to be explained, I could attribute no other blame to Mr. *Graham* than that he had, as I conceive, in such a case misconstrued those Acts; because, although I have

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come to the clear conclusion that what this Act of Parliament of 1861 meant was that he should receive the salary of £1200 a year in discharge and entire satisfaction of all the duties which he had to discharge as official assignee, whether official assignee in bankruptcy, or official assignee discharging other statutory duties imposed upon him, I should have thought that the mere circumstance that he had not so construed that Act was not a matter for which I could impute to him any blame.

But if it be, as it was subsequently represented to me, that that £940 is not so made up, but a very small portion of it consists of that, then I cannot but think that Mr. *Graham* is very much to blame in not having included the whole, or at least so much of the money as is not attributable to those statutory duties; because I do not find from Mr. *Graham's* affidavit that he disputes the fact that he has returned £940 too little; therefore, unless that deficiency is to be explained in the way I had supposed it to be (which turns out, I believe, not to be accurate), I cannot exonerate Mr. *Graham* from very considerable blame. I think, therefore, that he is to be charged with this sum of £940, even supposing that it was wholly attributable to duties which he discharged under various statutes, and not as merely an ordinary official assignee.

Then, beyond that, there is this question—Is he entitled or not to act upon what the Commissioners seem to have sanctioned—namely, that he should retain the whole of the fees and remunerations received in respect of duties under old bankruptcies discharged partly prior and partly subsequent to the 11th of October, 1861? is he entitled, as the Commissioners thought, to retain the whole of that, except twenty per cent. to be allowed for the use of the clerks and offices? or is he to be only entitled to retain that which is the amount actually earned before the passing of this Act? I am of opinion that the Commissioners were wrong, and that it is not a matter in respect of which there is any limitation of time, as the Commissioners have merely sanctioned the passing of the accounts in a manner which they had no right to sanction. I think the Commissioners may have exercised a very reasonable discretion if their premises, on which I presume they acted, had been right—namely, that Mr. *Graham* had a vested right to the

emoluments in respect of bankruptcies occurring prior to the passing of the Act of 1861. If that had been so, I do not know any mode in which the matter could have been dealt with otherwise than by saying, "Then you must keep the whole, for the whole belongs to you; but inasmuch as since the passing of the Act you have been exonerated from the obligation of furnishing certain clerks which you were obliged to furnish before, therefore with respect to the public having furnished you with those clerks, you shall pay to the public that which is a fair remuneration for the benefit you have so derived, and they fixed that at twenty per cent. upon the whole receipts." Whether that was correct or not I have no means of ascertaining, but I am clearly of opinion that that was an erroneous principle, though it would have been a right principle if Mr. *Graham* had a vested right in these fees, to which I think he is not entitled at all. He was a public officer, who up to a certain date—namely, the 11th of October, 1861—was entitled to be remunerated for his services as official assignee in a certain mode, and after that date he was to be remunerated for his services in another mode, and that other mode was a mode which I think prevented him from taking one farthing for his own benefit in respect of fees received, whether on a prior bankruptcy or a subsequent bankruptcy.

The result of the whole, therefore, is, that he is chargeable with the £940, and with the difference between that which he has paid in and the whole fees received since the passing of the Act, in respect of matters partly done before and partly after, and those two items together amount to the sum of £1660.

It is said that he acted upon the authority of the Commissioners, and that that authority was sufficient to justify him. If the question whether he should pay costs or not depended upon that, I should be much inclined to say that, he having acted in the mode the Commissioner pointed out, it would be hard to visit him with costs, because he had done that which the Commissioners led him to suppose was right. But I think that the notion of treating this as an appeal is out of the question. An appeal would be between litigant parties before the Commissioners; but he was no litigant party; he was a public officer, receiving public money, for which he is bound to account.

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Before I mention the matter of costs I would advert to the other head of charges, which is £579; but of that £96 has been already paid; therefore it is reduced to £483, made up of two sums of £164 and £319.

Now, with regard to the £96, I think there is no blame imputable to Mr. *Graham*. It arose from the sale of old books, and it was exceedingly difficult to know how he was to apportion it, and to whom it was to belong. He has fairly accounted for that, and it has been all paid now. It goes, not to the Chief Registrar's account, but, I think, to the unclaimed dividend account, which is a sort of account in which may be included little things out of the Court of Bankruptcy that are too small to be apportioned amongst each particular bankruptcy, or which cannot be apportioned amongst them.

There are the two remaining sums of £164 and £319, making together £483. These two stand upon the same footing; they are portions of the fees and emoluments which were received by Mr. *Graham* subsequent to the *Bankruptcy Act*, and as to which he says that the first extends over 119 estates, and the other over many more, and are made up of very small sums—sums as small as two shillings, which he says that, under the statute, he was entitled to retain as for outgoings from his own pocket, for which he was to be reimbursed. He says he has had the whole investigated since, but not in the statutory mode, because he could not get them investigated in the statutory mode; but he has had them looked at by the registrars, and the sums all appear to have been fairly allowed to him, and none of them are now due to the public. This may turn out to be accurate; but I do not know what I can do as to these sums, except to direct an inquiry as to whether these sums have been properly retained. I dare say it will turn out that they have been; but I think I cannot, on behalf of the public, take Mr. *Graham's* affidavit alone on the subject.

Mr. *Graham* asked for a further inquiry as to the manner in which the £940 was made up.

MINUTES:—Inquire how much of the £940 was received by the said *G. J. Graham* in his capacity of official liquidator or as trustee under 7 & 8 Vict. c. 70.

Inquire how much of the £2950 (the amount of the two sums of £2010 and

£940) has been received for work done before the 11th of October, 1861, beyond the sum of £328.

Inquire what part of the sums of £164 and £319 the said *G. J. Graham* is entitled to retain for his own use.

Declare that, as to all work done since the 11th of October, 1861, the said *G. J. Graham* is entitled to no fees or remuneration beyond his salary of £1200 per annum, and that, as to all money received on account of work done since that date, the same is payable to the Chief Registrar.

Declare that the whole of the sums of £2010 and £940 ought to have been brought into the half-yearly returns.

Declare that the said *G. J. Graham* is entitled to retain or be allowed the sum of £328 as having been received by him for work done prior to the 11th of October, 1861, and also the sum of £401 already paid by him.

Declare that he is to be allowed to retain out of the £2950 what further sum, if any, has been received by him for work done prior to the 11th of October, 1861.

Declare that the said *G. J. Graham* do, on or before the — day of ——, pay to the Chief Registrar's account the sum of £940, and that the remainder of the balance of £2950 do abide further order.

Declare that the said *G. J. Graham* is properly chargeable with the sums of £164 and £319 until the retention of the same has been duly allowed by the Court of Bankruptcy.

Reserve the consideration of costs.

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Solicitors for the Relator: Messrs. *Aldridge, Bromley, & Thorn.*
Solicitor for Mr. *Graham:* Mr. *J. R. Chidley.*

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Jan. 7, 30.

Mortgage—Receiver—Trustee—Redemption.

A mortgagor and his two incumbrancers, by a deed, conveyed the mortgaged estates to trustees on trust to keep down the interest on the charges, and to accumulate the surplus rents and apply them in payment of principal, with an ultimate trust for the mortgagor; and by the deed it was declared that, nothing therein should derogate from the rights of the incumbrancers, and that, when they were paid off, the trusts of the deed should cease:—

Held, that a subsequent judgment creditor of the mortgagor could maintain a bill against all parties to the deed, and have the accounts taken under the deed without offering to redeem.

The receiver in an ordinary receiver-deed is the agent of the mortgagor only, but not so in a deed such as this, which created other trusts.

2 Ch. 638
8 Ch 38

MR. SAMUEL AUCHMUTY DICKSON was entitled to certain estates in *England*, for life, producing about £3000 a-year, and to

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certain estates in *Ireland* for life; and to other lands in *Ireland*, for an estate tail, and to other lands in *Ireland* for an estate for life in reversion, the estates in *Ireland* producing about £5000 a-year. All these estates were mortgaged to the *Guardian Fire and Life Assurance Company* for £35,000, and were also charged with the payment of annuities, and principal sums of money to a very large amount, secured partly by deeds and partly by judgments, all of which had, before the 13th of May, 1861, become vested in Mrs. *Harriet Dickson*, or in Colonel *William Thomas Dickson*. By an indenture dated the 13th of May, 1861, and made between *S. A. Dickson* of the first part, *Harriet Dickson* of the second part, *W. T. Dickson* of the third part, and *M. S. West* and *G. A. Trevor* of the fourth part, after reciting the creation and transfers of the various annuities and securities, and the judgments which were charged on the lands of *S. A. Dickson*, and had become vested in Mrs. *Dickson* and Colonel *Dickson*, and reciting that, upon the treaty for the advances made by Colonel *Dickson* and Mrs. *Dickson* for the purpose of taking the thereinbefore recited transfers, *S. A. Dickson* had agreed, by way of additional security, to convey the hereditaments thereinafter comprised to *West* and *Trevor*, upon the trusts thereinafter expressed; but subject nevertheless to the proviso for determination of such trusts thereinafter contained, it was witnessed that *S. A. Dickson* thereby granted and confirmed unto *West* and *Trevor* all the above-mentioned estates in *England*, and in *Ireland*, to hold the same subject to the several incumbrances thereon, unto *West* and *Trevor*, for the estates therein of *S. A. Dickson*. And in the said indenture was contained a declaration that *West* and *Trevor*, the trustees of the said indenture, should hold the said lands upon trust to let the same, or keep in repair, improve, order, and manage the same, as they should think proper, and should receive the rents and make allowances as if they were actual owners. And it was thereby declared that the rents, issues, and profits, which should be received by the trustees, should be applied, in the first place, in the payment of all outgoings and expenses; and, in the next place, in keeping down the annuities in favour of *Harriet Dickson*, and in keeping down and paying the interest on the amounts secured by the other thereinbefore mentioned incumbrances accord-

ing to their priorities; and, in the next place, in keeping up certain policies of assurance therein mentioned; "and, in the next place, in making any payments on account of any judgment now, or which may hereafter be entered up, against the said *S. A. Dickson*, which the trustees or trustee for the time being of these presents may find it necessary to pay for the protection of the said trust estate or any part thereof." And, in the next place, should invest and accumulate the residue, if any, of the rents, issues, and profits, in order to form a fund for the purpose of making at any future time or times, when required, the payments thereinbefore mentioned, and for or towards discharging or meeting the said incumbrances thereinbefore mentioned. And that the trustees should stand seised of the trust estate and the produce, subject to the said trusts and purposes, in trust for *S. A. Dickson*, his heirs, executors, administrators, and assigns, absolutely. And in the said indenture was contained a proviso that nothing therein contained should prejudice the rights of *Harriet Dickson* or *W. T. Dickson* under or by virtue of the said incumbrances; and that any rights thereby conferred on the said *H. Dickson* or *W. T. Dickson*, and each of them, should be supplemental and auxiliary to their respective rights, under or by virtue of the said incumbrances, or any of them, and should in no wise derogate from the same. And it was lastly provided that, "when and so soon as all moneys secured to the said *H. Dickson* and *W. T. Dickson*, under and by virtue of all and singular the securities in that behalf recited (including the said judgments), shall be fully paid and satisfied, then, in such case, these presents and every clause, matter, and thing herein contained, shall cease, determine, and become void."

On the execution of this deed the trustees, *West* and *Trevor*, entered into receipt of the rents and profits, and either cut down, or allowed *S. A. Dickson* to cut down, timber.

The Plaintiff, *S. A. Jefferys*, as the public officer of the *North Wilts Banking Company*, had recovered two judgments against *S. A. Dickson*—one in August, 1862, for £138, the other in October, 1862, for £82. On the 14th of January, 1863, these judgments were registered, and the Plaintiff sued out a writ of *fi. fa.*, under which nothing was realised.

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In January, 1864, the Plaintiff filed his bill against *S. A. Dickson*, *Harriet Dickson*, *M. S. West*, and *G. A. Trevor*, and some subsequent judgment creditors of *S. A. Dickson*, stating the facts as to the Plaintiff's judgments, and part of the deed of the 13th of May, 1861, and charging that the Defendants had allowed *S. A. Dickson* to receive rents and cut timber, and had wasted the proceeds, and that they ought to apportion the rents of the English and Irish estates, and that, if such part of the annuities and interest as the English estates ought properly to bear was paid, there would remain a large surplus, which ought to be applied in payment of the Plaintiff's judgment debts. And the bill prayed a declaration that the judgments entered up by the Plaintiff operated as a charge upon the English estates, and that, under the trusts of the said indenture, the Plaintiff was entitled to be paid out of the surplus rents and profits of the English estates, after keeping down and paying so much of the annuities and interest as the English estates ought to bear; and that an account might be taken, in the presence of *Harriet Dickson* and *W. T. Dickson*, of the rents and profits of the English and Irish estates, and of the annuities, and that the surplus rents might be ascertained and applied in payment of the Plaintiff's debt and the costs of this suit; and that an account might be taken of the timber cut, and many other inquiries and accounts.

The suit came on upon motion for a decree before the Vice-Chancellor *Wood*, who, on the 2nd of May, 1865, made a decree declaring that the trusts of the deed of 1861 ought to be carried into execution, regard being had to the rights of the Plaintiff and other subsequent judgment creditors, and directing inquiries as to the estates comprised in the indenture of 1861, and of the rents and profits received under it by the trustees, and how these rents and profits had been disposed of, and a similar account as to the timber; and adjourned the further hearing of the cause.

The Defendant, Mrs. *Dickson*, appealed.

Mr. *Rolt*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiff:—

The only question on this appeal is as to our right to an account; they say that we have no right unless we offer to redeem

the other mortgagees. We have merely the usual decree against trustees for an account which we are entitled to as equitable mortgagees claiming under *S. A. Dickson* (1); *Ford* v. *Rackham* (2).

Mr. *G. M. Giffard*, Q.C., Mr. *Kenyon*, Q.C., and Mr. *Langworthy*, for Mrs. *Dickson*:—

The estate is not enough to pay the outgoings and charges, and this is an attempt to compel us to pay this small debt, sooner than be put to the enormous expense of useless accounts. The rule of the Court has always been that a mortgagee shall not be compelled to account by any incumbrancer who is not willing to redeem: *Dalmer* v. *Dashwood* (3) is very like this case. This deed is exactly like a common receiver deed, and was never intended to secure any creditors but Mrs. *Dickson* and Colonel *Dickson*, and is merely an additional security for them. The judgments they are to pay off are only such as the trustees, acting for their interests, think fit. The whole of the income is to be accumulated for a sinking fund for them, and as soon as they are paid the deed is at an end. How can such a deed have altered the position of the mortgagees for the worse, and expose them to this expense? for it will all fall on them, and the Plaintiff will get nothing. A subsequent mortgagee can only avail himself of this deed by redeeming. The deed is in fact another mortgage. The Plaintiff claims under 1 & 2 Vict. c. 110, s. 13, which makes a judgment a charge upon land, and the only right of a creditor is to a sale, not to an account: *Tasker* v. *Small* (4). It is clear that, but for this deed, the Plaintiff could have no right whatever to come here; and the deed expressly provides that our rights shall not be derogated from. If this bill is filed in good faith, and the Plaintiff believes that there is really a surplus, let him redeem us: *Dalton* v. *Hayter* (5); *Knight* v. *Bowyer* (6). At all events, the accounts cannot be carried back indefinitely, as is ordered by the decree.

Mr. *Surrage*, for the trustees of the deed:—

We say that the Plaintiff does not stand in the relation of *cestui*

(1) 1 Set. 3rd ed. 454.
(2) 17 Beav. 485.
(3) 2 Cox, 378.
(4) 3 My. & Cr. 69.
(5) 7 Beav. 313.
(6) 2 De G. & J. 421.

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que trust to us, and how can he be under such a deed, which is merely an additional security to other mortgagees? We have to account to the mortgagees, and if this bill holds good we may have to account to as many judgment creditors as choose to file bills against us. The bill does not venture to allege that there is any surplus in our hands. If there was we might have to account.

Mr. *Speed*, for the subsequent judgment creditors.

Mr. *Rolt*, in reply:—

There is a clear distinction between a receiver deed and a deed which, like this, includes other objects and creates rights besides satisfying the mortgage; there is a provision for payment of judgment debts, and there are many other provisions. No mere receivership deed ever contained such provisions. We stand in the place of the mortgagor, who could have filed this bill and have had the accounts taken. As to the time over which the accounts are to be taken, we have a right to the surplus in the trustees' hands whenever they received it.

Jan. 30. LORD CRANWORTH, L.C., after stating shortly the facts of the case, and part of the clauses of the deed of 1861, continued:—

The main ground of the appeal was, that such a suit as this cannot be maintained by any person standing, like the Plaintiff, in the position of a subsequent incumbrancer against the prior incumbrancers without offering to redeem them. The question is, whether the rule on which that argument is founded is applicable to this case. A mortgagee is at law, and for many purposes in equity also, regarded as the owner of the mortgaged estate. The mortgagor has in equity a right to redeem the estate on paying to the mortgagee the principal and interest due to him, and for that purpose, but for that purpose only, to draw the mortgagee into litigation; for all other purposes he has parted with his whole estate to the mortgagee, and has no right to call in question the mode in which he may be dealing with that of which, except as to

his liability to be redeemed, he is, as between himself and the mortgagor, the absolute owner. This rule applies also to persons claiming any interest from the mortgagee by a title created subsequently to the mortgage, and hence arises the rule that neither the mortgagor nor any one claiming under him can make a mortgagee party to any suit he may institute without offering to redeem. But the rule cannot apply universally to cases in which there are other relations between the parties besides that of mortgagor and mortgagee.

If a mortgagee for the purpose of improving his security, or indeed for any other purpose, becomes party to a deed whereby trusts are created affecting the equity of redemption, whether for the benefit of the mortgagees or for any other object, he cannot object to any party interested in those trusts taking the necessary steps for enforcing their due performance. The Vice-Chancellor came to the conclusion that in this case the mortgagees had concurred with the mortgagor in a deed under which trusts were created in which he was interested, so that he, and consequently the Plaintiff as an equitable incumbrancer claiming under him, had a right to enforce the due execution of these trusts. In this view of the case I concur. By the deed in question, Mr. *Dickson* conveyed all the mortgaged property, Irish and English, to the Defendants *West* and *Trevor*, upon trusts which may be described generally as trusts for better securing to the Defendants Mrs. *Dickson* and Colonel *Dickson* the payment of the annuities and of the interest on the mortgages to which, by assignment or otherwise, they had become entitled. Subject to this trust, they were to hold the property conveyed to them in trust to accumulate the rents and profits so as to create a fund for the purpose of satisfying the annuities and other incumbrances; and subject to these trusts, they were to hold the trust property in trust for *S. A. Dickson*, the mortgagor, and his heirs and assigns.

Did this create a trust for the benefit of *S. A. Dickson* which he was entitled to enforce, without first paying off the incumbrances?

I cannot doubt that it did. He has a direct interest in seeing that the trustees duly apply the rents and profits of the estates, first, in discharging the claims of the incumbrancers, and then in making the accumulations stipulated for by the deed. And if

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S. A. Dickson could file a bill for carrying into execution the trusts of this deed, so also can the Plaintiff, who is in substance an equitable incumbrancer claiming title under him.

It was said in answer that these trustees are merely the receivers of the mortgagees, and that no bill can be filed by a mortgagor against his mortgagee, where there is a receiver of the rents, without an offer to redeem. This, if the question is as to his right to proceed against the mortgagee, may be true. But a receiver who has been appointed by a mortgagee under the ordinary power for that purpose, is in possession as agent, not of the mortgagee, but of the mortgagor, and it cannot be that the mortgagor, if his agent is receiving and misapplying the rents, has no means of calling him to account without paying off the mortgage. It may be that he could not make the mortgagee party to a bill against the receiver without offering to redeem; but if that be so, it must follow that he might file a bill against the receiver alone, treating him as his agent, bound to account for all his receipts after keeping down the interest due to the mortgagee. And this may well be; for though it is the mortgagee who in fact appoints the receiver, yet in making the appointment the mortgagee acts, and it is the object of the parties that he should act, as agent for the mortgagor. He, as agent of the mortgagor, appoints a person to receive the rents, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions are supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver, therefore, in the relation between himself and the mortgagor, stands in the position of a person appointed by a deed to which the mortgagee was no party.

I have adverted to all this because a doubt was suggested in argument whether the bill ought not in this case to have been filed against the trustees only, not making the incumbrancers co-defendants. But this, I think, could not have been done. These trustees were not mere receivers appointed by the mortgagor. They were persons to whom the mortgagor, with the concurrence of the incumbrancers, conveyed the equity of redemption upon certain trusts, in the creation of which, as being parties to the deed of conveyance, they concurred. I think, therefore, on prin-

ciple as well as on the authority of *Ford* v. *Rackham* (1), that they were properly made parties. This right, however, of the mortgagor, and of the Plaintiff claiming from him, leaves untouched the rights of the incumbrancers under their securities prior to the deed. The interest on which the trusts attached was only the equitable interest which remained in *S. A. Dickson,* and the incumbrancers by joining in the deed did not forfeit or forego any of their prior rights.

On these grounds I am of opinion that the Vice-Chancellor was right, not only in declaring that the Plaintiff by virtue of his judgment had acquired a valid charge on all the real estates of *S. A. Dickson,* and in the inquiries and accounts which he directed as consequent on the right so declared, but also in declaring that the Plaintiff was entitled to have the trusts of the deed performed and carried into execution.

It appears to me, however, that in the accounts which his Honour has directed as to what has been done under the trusts of the deed, the decree goes beyond what the practice of the Court or general principle will warrant. The account is directed without any limit as to the time at which it is to commence. It is clear that the Plaintiff can have no right to any account as to what was done with the rents and profits before the date of his judgment; but I think, further, that the account can only commence from the time of filing the bill. Though the statute gives to a judgment creditor the rights of an equitable incumbrancer, yet that is a right which he may not feel it his interest to insist on; and until he has taken some step to enforce it, he cannot complain of persons who stand in the position of trustees for the judgment debtor if they continue to discharge their trusts as if no such judgment existed.

The decree must, therefore, be varied by confining the inquiries and accounts directed under the trust deed to the period which has elapsed since the filing of the bill.

The direction in the decree forbidding the trustees to pay any judgments subsequent to that of the Plaintiff, appears to me perfectly right.

With regard to the costs of the appeal, I cannot make the

(1) 17 Beav. 485.

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Appellant pay them, as I have made a material variation as to the inquiries and accounts, except that she must pay the costs of the judgment creditors, who are made co-defendants. I shall leave the Appellant to pay her own costs, and shall direct the costs of the Plaintiff to be costs in the cause.

Solicitor for the Appellants: Mr. *R. A. Mitchell.*
Solicitors for the Plaintiff: Messrs. *Pinniger & Wilkinson.*

L. C. 1865 *Nov.* 14, 16. *Jan.* 22, 1866

SEIXO *v.* PROVEZENDE.

Trade Mark—Similarity—Name.

No trader can adopt a trade mark so resembling that of another trader, that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade marks side by side.

Nor can a trader, even with some claim to the mark or name, adopt a trade mark which will cause his goods to bear the same name in the market as those of a rival trader.

THE Plaintiff in this case was the Baron *do Seixo*, a Portuguese nobleman, and was the proprietor of a quinta, or estate, in the province of *Alto Douro*, in *Portugal*, called the *Quinta do Seixo*, whence he took his title. This quinta had long been celebrated for the quality of the port wine grown there, and the Plaintiff had been in the habit of consigning nearly the whole of the growth to Messrs. *Sadler & Harrison*, of *London*. The Plaintiff had long, or at all events since 1848, been in the habit of distinguishing the wine grown upon his quinta by the following brands: the figures of a crown and an eagle with the letters "*B. S.*" (meaning Barao, or Baron *do Seixo*) on the head of the cask, and a crown, with the word "*Seixo*," and the year of the vintage, at the bung-hole. The Plaintiff further stated that he had the exclusive use of these marks, and that his wine had long been known in the *London* market as "*Crown Seixo*" wine, and had as such acquired a great reputation.

The Defendants were merchants in *London*, trading as "*Caldas Brothers*," and had lately received from *Oporto* 100 pipes of port, marked on the head of the casks with the figure of a crown, and

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the letters "*C. B.*," and the words "*Seixo de Cima*" (meaning *Upper Seixo*), and the date 1861; and at the bung-hole a crown with the letters "*C. B.*," the words "*Seixo de Cima*," and the date 1861, and were offering this wine for sale, and they intended to import 100 pipes more. The Plaintiff thereupon, on the 12th of September, 1863, filed a bill to restrain the Defendants from using the mark or a crown, and the word "*Seixo*," or any other colourable imitation of the brands used by the Plaintiff.

The Defendants, the Baron *de Provezende*, and *G. C. Sottomayor*, and *F. Caldas*, trading as "*Caldas Brothers*," by their answer stated that they were in partnership with the grower of the wine in question in *Portugal;* that they rented a quinta belonging to Donna *Pires*, the niece of one of them, and surrounded on all sides but one by the Plantiff's quinta, and that they believed that it was known as the *Quinta do Seixo* of Senhor *Pires;* that they were the owners of two other small vineyards in the *Alto Douro* district, called also *Seixo;* that by arrangement with Donna *Pires* they were entitled to use her brand of *Seixo de Cima*, that being the name of her above-mentioned estate; that there were many other quintas called *Seixo*, which meant "stony" or "pebbly;" that the marks on their casks were not a crown, but a coronet, which the Baron *de Provezende* had a right to use as being a grandee of *Portugal;* and that "*C. B.*" meant "*Caldas Brothers*," and "*Seixo de Cima*" was the name of their quinta, which was higher up the *Douro* than the Plaintiff's quinta, and that they put the words "*de Cima*," and the letters "*C. B.*," and the coronet, to distinguish their casks from the Plaintiff's, and that no one could mistake them.

A great quantity of evidence was entered into on both sides upon many points, particularly as to whether the Defendants' quinta had ever been called *do Seixo*. It was proved by the Plaintiff, and not denied, that the broker employed by the Defendants had offered this wine as "*Crown Seixo de Cima*" wine; and one broker deposed that he was surprised at being offered this wine by the broker of the Defendants, and thought it was the Plaintiff's. The Plaintiff's quinta would produce about 300 pipes a-year, but those of the Defendants together would not produce more than 40 pipes.

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Other points of evidence will appear in the judgments of the VICE-CHANCELLOR and the LORD CHANCELLOR, given below.

The cause came on upon motion for a decree before the Vice-Chancellor *Wood*, who, on the 17th of January, 1865, delivered judgment. His Honour commented on the evidence, and came to the conclusion that the Plaintiff's quinta had, since 1788 at all events, been called *do Seixo*, and that the Defendants' quinta had never borne that name. It was therefore an indication of *mala fides*, that the Defendants attempted to give this name and also that; whereas the whole produce of the quintas of that name belonging to the Defendants was not more than 40 pipes, they were going to import 200. At the same time his Honour thought that the Defendants' quinta was shewn to be in a district called "*Sitio do Seixo*" or "the stony country," and that they must not be deprived of the power of saying so, but still it was their business to distinguish their wine properly, which they had not done, and had actually misled one purchaser by calling it "*Crown Seixo de Cima*," or at least led him to inquire what it meant. His Honour then granted an injunction to restrain the Defendants from affixing or causing to be affixed, to any casks of wine shipped to their orders, the brand or mark of a crown and the word *Seixo*, or any other combination of marks or words so contrived, as by colourable imitation, or otherwise, to represent the marks or brands of the Plaintiff, and from employing any marks or words which should be so contrived as to represent, or induce the belief, that such wines were Crown *Seixo*, or the produce of the quinta *do Seixo*, or otherwise using the word *Seixo* without clearly distinguishing the same from the wine produced by the quinta *do Seixo;* and he ordered the Defendants to pay the costs of the suit.

The Defendants appealed.

Sir *H. Cairns*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *Macnaghten*, for the Plaintiff:—

Even if *Seixo* was a common name like "*Heath*," the Defendants could not assume it when it had been appropriated by the Plaintiff. *Perry* v. *Truefitt* (1), *Croft* v. *Day* (2), *Clark* v. *Freeman* (3). They also argued that, on the evidence, the Defendants had

(1) 6 Beav. 66. (2) 7 Beav. 84. (3) 11 Beav. 112.

no right to these brands, and that they were too similar to those of the Plaintiff.

Mr. *Rolt*, Q.C., and Mr. *Cracknall*, for the Defendants:—

In *Croft* v. *Day*, the case was clear. In *Cartier* v. *Carlile* (1), there was no dispute about the similarity. The Plaintiff cannot restrain the use of a common word like *Seixo*: *McAndrew* v. *Bassett* (2). The marks are sufficiently distinct, and the Court will not interfere because a careless person might mistake the marks. *Edelsten* v. *Edelsten* (3) was a clear case of colourable imitation, and so was *Braham* v. *Bustard* (4). There is no example among the precedents collected in 2 *Seton* Decr. (5), for a decree like this. We have a perfectly independent mark, to every part of which we have a right, and every part of which has a meaning, and we can deceive no one. The principles of *Leather Cloth Company* v. *American Leather Cloth Company* (6) are in our favour.

Sir *H. Cairns*, in reply, cited *Hogg* v. *Kirby* (7); *Motley* v. *Downman* (8); *Franks* v. *Weaver* (9); *Glenny* v. *Smith* (10).

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Jan. 22. LORD CRANWORTH, L.C., after shortly stating the facts of the case, continued:—

If the question turned on the inquiry, whether a person having a cask of the Plaintiff's and a cask of the Defendants' placed before his eyes could mistake the one for the other, there could be no doubt as to the result, for the marks on the one and on the other are altogether different. But that is not the question, or not the sole question, to be considered. The principle on which relief is given in these cases is that one man cannot offer his goods for sale representing them to be the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether result-

(1) 8 Jur. (N. S.) 183; 31 Beav. 292.
(2) 10 Jur. (N.S.) 550.
(3) 9 Jur. (N.S.) 479; 1 D. J. & S. 185.
(4) 1 H. & M. 447.
(5) P. 914.
(6) 11 Jur. (N. S.) 513.
(7) 8 Ves. 215.
(8) 3 My. & Cr. 1.
(9) 10 Beav. 297.
(10) 13 W. R. 1032.

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ing from the greater demand for his goods or from the higher price which the public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy.

The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated.

It is obvious that, in these cases, questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity.

What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *à priori*. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled.

It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use.

If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration.

If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device. It is mainly on this ground that I have come to the conclusion that the decision of the Vice-Chancellor in the present case was correct.

Ever since the year 1848, the Plaintiff, Baron *Seixo*, had caused his casks to be stamped with his coronet and the word "*Seixo*," and the evidence shews that his wines had thus acquired in the market the name of "*Crown Seixo* Wine." When, therefore, the Defendants, in the year 1862, adopted as their device a coronet, with the words "*Seixo de Cima*," meaning "*Upper Seixo*," below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from *Oporto* would suppose that, in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as "*Crown Seixo* Wine." The present case is thus brought distinctly within the principle on which all these cases rest. The Plaintiff had adopted a device or trade mark which had caused his wines to obtain celebrity under a name descriptive of that trade mark. The Defendants have adopted a trade mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the Plaintiff's wines were known, and so to believe that in purchasing them they would be purchasing the wines of the Plaintiff. Against the use of such a trade mark the Plaintiff has, I think, a right to have the injunction of this Court.

A long and elaborate attempt was made to shew that the Defendants had a right to the use of the trade mark which they have adopted. They have, either as owners or lessees, a vineyard adjoining that of the Plaintiff, and several small vineyards on the opposite side of the river. "Seixo," it was said, meant "stony" or "pebbly," and "*Vino do Seixo*," therefore, was only the same thing as "*Vin de grave*" in *France*, or "*Stein wein*" in *Germany*. The Defendants' vineyards, it was said, were, or some of them were, if not forming part of the Plaintiff's quinta *do Seixo*, at all events

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situate on what is called the Sitio *do Seixo*, or the district of *Seixo*. The evidence as to the precise nature of the Defendants' title to their different vineyards, and of the names by which they are known, is by no means clear; but I think it immaterial to pursue any inquiries on this subject. For even assuming the truth of what is contended for by the Defendants, *i.e.*, that parts of their vineyards are known by the name of *Seixo*, that does not justify them in adopting a device or brand the probable effect of which is to lead the public when purchasing their wine to suppose that they are purchasing wine produced from the vineyards, not of the Defendants, but of the Plaintiff.

Cases may be imagined, though very unlikely to arise, in which a person bringing into the market for the first time the produce of a newly-established manufacture, to come into competition with one already established, may really be embarrassed as to the mode in which he should describe it, so as not to interfere with the description adopted by a manufacturer who has been before him. If such a case should arise, it must be dealt with on its own merits. But here I feel it impossible to doubt that the Defendants in adopting the trade mark, which they in fact adopted, must have known that they would be thereby likely to gain for their wines some of the celebrity which had attached to those of the Plaintiff; at all events, whether this was or was not present to the minds of the Defendants, it was the inevitable consequence of the course they took.

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The Defendants rested their argument in part on the case of *Leather Cloth Company* v. *American Leather Cloth Company* (1). But the facts of that case bear no resemblance to the present. There, both parties, Plaintiffs and Defendants, were manufacturing and dealing in the same article, known in the market as American Leather Cloth; neither party had an exclusive right to that name, and the Plaintiffs had not acquired any particular name for their American Cloth, unless indeed the name of *Crockett & Co.*, the persons from whom they had purchased their business, could be so considered. But no one, looking at the Defendants' trade mark, could be led to suppose he was purchasing goods from what was originally *Crockett's* manufactory.

(1) 11 Jur. (N. S.) 513.

Unless a purchaser could be deceived by the similarity of the trade marks, he could not be deceived at all, and the House of Lords thought that the two trade marks were so different that no one could suppose them the same. This case, therefore, affords no support to the Defendants. In order to assimilate that case to the present we must suppose that the Plaintiffs there had so marked their goods with the name of "*Crockett*" as to have obtained for it in the market the name of "*Crockett's* American Leather Cloth," and then that the Defendants had adopted a device which would lead purchasers to suppose that their cloth was not merely American Leather Cloth, which it was, but *Crockett's* American Leather Cloth, which it was not. The two cases are entirely different, and the present appeal must be dismissed, and of course with costs.

Solicitors for the Plaintiff: Messrs. *Uptons, Johnson, & Upton.*
Solicitor for the Defendants: Mr. *C. Richardson.*

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WILLIAMS *v.* GLENTON.

Vendor and Purchaser—Interest—Costs—Delay "from any cause whatsoever"—Devise by Vendor to an Infant.

S. W. contracted to sell a moiety of an estate to *G.*, the purchase to be completed on the 24th of June, 1854, and if "from any cause whatever" the purchase should not be completed on that day, the purchaser to pay interest. Just before the 24th of June, the other part owner set up a claim to the entirety, and refused to produce the deeds. *G.* applied at distant intervals to know when the vendor would complete, and never expressed a wish to rescind. In 1857, *S. W.* filed a bill for partition, and died in March, 1858, leaving a will made in 1856, by which he devised his estates to infants, two of whom were his heirs. In July, 1861, *S. W.*'s executors revived the partition suit, and in January, 1862, *G.* was made a party by amendment, pursuant to an arrangement made at his request in May, 1861. In July, 1862, a decree for partition was obtained and the certificate made in July, 1863. *G.*, who had, in June, 1854, when the dispute arose with the co-owner, given notice that he would not pay interest, but had ever since employed the purchase-money in his trade, refusing to pay interest, *S. W.*'s executors, in 1864, filed a bill against him and the infant devisees for specific performance, and the Master of the Rolls decreed specific performance, and ordered *G.* to pay interest from June, 1854, and to pay all the Plaintiff's costs :—

Held, on appeal, that the circumstances were not such as to exempt the purchaser from payment of interest according to the contract.

But *held*, that the purchaser ought not to have been ordered to pay the whole costs, for that if there had been no dispute about the interest a suit would have been necessary on account of the devise to the infants, and in such a suit the purchaser, in the opinion of the Lord Justice KNIGHT BRUCE, would have been entitled to his costs; and, in the opinion of the Lord Justice TURNER, would in the circumstances of the case neither have received nor paid costs.

Per TURNER, L.J. :—A vendor is ordinarily bound to take the steps within his power to complete his contract, and heavy damages would be given for default; but he is not bound to enter into litigation with an adverse claimant in order to perfect his title.

THIS was an appeal by the Defendant *Glenton* from a decree of the Master of the Rolls so far as it decided that he was liable to pay interest on the purchase-money of an estate which he had contracted to buy, from the 24th of June, 1854, the day named by the contract for completion.

On the 27th of March, 1854, *Samuel Williams*, being entitled as one of the gavelkind heirs of his father to a moiety of an estate, contracted to sell it to *Glenton* for £9000, subject to a lease of the entirety, for a term expiring in 1865, at a rental of £249. The contract provided that the abstract should be delivered within a fortnight, and that the purchase should be completed on the 24th of June; and that if, "from any cause whatever," the purchase should not be completed on that day, the purchaser should pay interest at £4 per cent. from that day until completion.

On the 18th of April, no abstract having been delivered, the purchaser applied for one, and it was delivered to him. It turned out to be imperfect, and on the 31st of May a further one was delivered. The vendor then applied to Mr. *Rose*, a solicitor who held the title deeds on behalf of the vendor and *John Williams*, the other part owner, for production of them to the purchaser. Mr. *Rose*, at the instigation of *John Williams*, refused production; and ultimately, in the month of June, *John Williams* set up a claim to the whole estate, alleging that it was not of gavelkind tenure. The purchaser alleged that the vendor knew of *John Williams's* claim when he entered into the contract; but the Court considered the evidence to establish that the vendor had no notice of it.

On the 19th of June the vendor's solicitors applied to *Glenton* to send draft conveyance. *Glenton's* solicitors, on the 20th, wrote declining to do so, as the abstract had not been compared with the deeds, and other matters were still in an unsatisfactory state; and stated that as the delay which was likely to occur was not owing to *Glenton*, who was ready with his money, he would decline to pay interest. No reply appeared to have been sent to this letter. On the 1st of January, 1855, *Glenton's* solicitor wrote to know when completion was to be expected; and it did not appear whether any answer was given. From this time till February, 1857, no communication appeared to have taken place between the parties; but in May, 1856, a conversation took place between their solicitors, in which *Glenton's* solicitor stated that his client would not take less than £7000 to be off his bargain, and would give £16,000 for the other moiety of the estate.

Early in 1857 the vendor filed his bill against *John Williams*

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for a partition. On the 5th of February in that year the purchaser applied to the vendor for inspection of the deeds. The vendor's solicitors replied, stating that the partition suit had been instituted; and nothing further passed between them till the death of the vendor.

The vendor died on the 24th of March, 1858, leaving a will dated the 1st of March, 1856, by which he devised and bequeathed all his property to trustees upon trust for his wife for life, and then for his infant children, without any power of sale, and in terms which appeared to vest the legal estate in the wife and children.

On the 21st of June, 1858, *Glenton* again applied to know when completion would take place, and a similar application was made in January, 1860, to which no written answer was returned. On the 2nd of August, 1860, *Glenton's* solicitors wrote for an abstract of the vendor's will to complete the abstract of title.

On the 1st of March, 1861, a bill of revivor was filed by the executors of the vendor against *John Williams* and the infant children of the vendor. On the 20th of May, 1861, a meeting took place between the solicitors of the vendor's executors and the solicitors of *Glenton*, and it was arranged, on the suggestion of the latter, that *Glenton* should be made a party to the partition suit. On the 1st of July, 1861, an order of revivor was made, and an order to amend was obtained on the 24th of January, 1862, and *Glenton* was made a party by amendment. A decree for partition was made on the 5th of July, 1862, and the certificate thereunder was made on the 11th of July, 1863. A conveyance was approved by which the lands allotted in severalty in respect of the vendor's moiety were conveyed to the uses of his will, subject to the contract with *Glenton*.

Matters being now ready for completion, *Glenton* insisted that he was entitled to complete without paying interest on his purchase-money. The vendor's executors filed the present bill in June, 1864, against *Glenton* and the vendor's infant children for specific performance. *Glenton* admitted that he had never set apart the purchase-money, but employed it in his business; and he admitted incidentally that he had profitable employment in his business for all his capital. The Master of the Rolls held that

after the delay which had taken place, the vendors were not entitled to specific performance if *Glenton* objected to it; but that if he wished specific performance he could only have it on the terms of paying interest; and *Glenton* electing to complete, his Lordship made a decree for specific performance on that footing, with an appointment of a person to convey on behalf of the infants, and ordered *Glenton* to pay all the costs of the suit.

Glenton appealed from this decree as regarded interest and costs.

Mr. *Southgate*, Q.C., and Mr. *W. Barber*, in support of the appeal:—

The purchaser ought not to pay interest, for he has throughout been in no default; whereas, the vendor was guilty of gross default and delay. He knew of this adverse claim of *John Williams* when he entered into the contract, and the proceedings in the partition suit were carried on at a pace which shews that the Plaintiffs did not wish to expedite matters. Such neglect and default are enough to take the case out of the conditions as to interest: *Sherwin* v. *Shakspear* (1): *Dart.* V. & P. (2). As to costs, we submit that the order of the Master of the Rolls is clearly erroneous, whether we are right or wrong as to interest. A suit was, in any event, necessary on account of the devise to the infants, and the costs of a suit confined to that object the Plaintiffs must have paid: *Wortham* v. *Lord Dacre* (3); *Purser* v. *Darby* (4); *Sanderson* v. *Chadwick* (5). The utmost that could properly be done against us would be to make us pay the costs so far as they were increased by our unsuccessful claim to be excused from interest; and as we should be entitled to receive our other costs, the fair order, if we failed as to interest, would have been to make a decree against us without costs.

Mr. *Hobhouse*, Q.C., and Mr. *Dauney*, for the Plaintiffs:—

The purchaser buys for £9000 a property subject to a lease of which there were eleven years to run at a rent of £125. He waits

(1) 5 D. M. & G. 517. (2) P. 418. (3) 2 K. & J. 437.
(4) 4 K. & J. 41. (5) 2 N. R. 414.

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till the lease has run out, and then objects to paying simple interest at £4 per cent. on the purchase-money, though he has been employing it in trade all the time. We have not been able to find in the books a single case in which the purchaser has been excused from payment of interest where he has not set aside the purchase-money (1). In all the recent cases since *De Visme* v. *De Visme* (2), which is virtually overruled, the purchaser has not been allowed to escape from a condition like the present unless there were very strong special grounds. In *Sherwin* v. *Shakspear* the day from which interest was to run was altered; but that was only because a new contract had been substituted for the old one, and the Court altered the day from which interest was to run in order to suit the changes of date. *Vickers* v. *Hand* (3), *Bannerman* v. *Clark* (4), *Lord Palmerston* v. *Turner* (5), shew the present inclination of the Court. The completion was delayed through no fault of the vendor, owing to an adverse claim of which he knew nothing when he agreed to sell; and there has been no such default on his part as to deprive him of the benefit of the stipulation for interest. Moreover, apart from the conditions, interest ought to be given on the ground that this was virtually a sale of a reversion: *Bailey* v. *Collett* (6); the existence of a small rent not altering the case: *Hutchinson* v. *Cathcart* (7). Then as to the costs, the Court discourages appeals as to costs: *Chappell* v. *Gregory* (8). The Plaintiffs would not have had to pay the costs of a suit for getting in the legal estate—a decree would have been made without costs: *Hanson* v. *Lake* (9); *Hinder* v. *Streeten* (10); *Bannerman* v. *Clark* (11). The Appellant relies on *Wortham* v. *Lord Dacre* (12), but the Vice-Chancellor there admits that if a vendor allows the property to descend to an infant heir his estate is not to pay the costs. In that case probably the heir was adult, and in *Purser* v. *Darby* (13) certainly was so; in such a case the testator by his own act of devising to an infant creates the diffi-

(1) Sug. V. & P. 11th ed. 793.
(2) 1 Mac. & G. 336.
(3) 26 Beav. 630.
(4) 3 Drew. 632.
(5) 33 Beav. 524.
(6) 18 Beav. 179.
(7) 1 Ir. Eq. 452.
(8) 2 D. J. & S. 111.
(9) 2 Y. & C. Ch. 328.
(10) 10 Hare, 18.
(11) 3 Drew. 632.
(12) 2 K. & J. 437.
(13) 4 K. & J. 41.

culty; but if the heir is an infant, no more difficulty is created by a devise to an infant than by intestacy; and if the vendor's estate does not pay the purchaser's costs in the latter case there is no reason why it should in the former. The argument on the other side must go this length, that it is the duty of every one who agrees to sell an estate to make or alter his will in such a way that a suit shall be unnecessary if he dies before completion. The authorities do not support such a contention. The decree if in strictness rather too hard upon the Appellant as to costs, is substantially right, for the costs of a suit confined to getting in the legal estate without this contest as to interest would have been a mere trifle.

Mr. *Baggallay*, Q.C., and Mr. *G. N. Colt*, for the infant Defendants, asked that their costs might be provided for.

Mr. *Southgate*, in reply:—

There is nothing in the argument, that this was a sale of a reversion, as the provision in the agreement for a lease gave the reversioner a power to resume possession of one-fourth of the property on apportioning the rent, so after completion the purchaser could have got as much as he would have wanted for building purposes. He was always anxious to complete, and repeatedly pressed for completion.

The LORD JUSTICE TURNER:—Could he not, having an equitable estate by virtue of the contract, have filed a bill to have the deeds produced?

Mr. *Southgate*:—We submit not: *Tasker* v. *Small* (1). The cases do not warrant the decision as to costs: *Midland Railway Company* v. *Westcomb* (2); *Eastern Counties Railway Company* v. *Tufnell* (3); *Hodson* v. *Carter* (4).

SIR J. L. KNIGHT BRUCE, L.J.:—

This is a suit for the specific performance of a contract to purchase a freehold estate in *Kent*, in which the Plaintiff is the vendor. There has been a decree for specific performance upon certain

(1) 3 M. & C. 63, 70.
(2) 11 Sim. 57.
(3) 3 Ry. Cases, 133.
(4) 1 N. R. 179.

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terms, and the Appellant is the purchaser. This appeal, however, raises but two points. He does not object to specific performance; he has, on the contrary, subject to two questions which I am about to mention, been uniformly desirous of obtaining specific performance. The only points to which his appeal in substance extends, are those of interest and costs; and, subject to any objection to the decree that may arise upon both or either of those points, he submits to specific performance.

The first question is that of interest, and it is material in point of amount on account of the comparatively small rent which the property produces, and the length of time during which the proceedings respecting the title have been going on. The state of the vendor's title was such that several years elapsed before the title could be completed. Several years passed after the time which had been fixed by the contract for completion; but the contract contained a clause which of late years has not been by any means uncommon, that if, from any cause whatever, the purchase should not be completed on the appointed day, interest should run upon the purchase-money. It has been for several years settled that, as a general rule, the state of the title, and difficulties respecting the title, do not exempt the purchaser from liability to that clause. It may, in a sense, be default on the part of the seller not to have his title ready; and the purchaser may not be in the slightest degree censurable for maintaining the objection. The vendor may be, in a sense, wrong in not having his title ready at the time specified; but I repeat it has notoriously been long settled that the mere existence of difficulties as to the title justifying the purchaser in refusing to complete until they are removed, does not exempt him from that clause relating to interest. It was so decided in *Sherwin* v. *Shakspear,* which has been adopted and approved by other judges; and the rule has been so laid down by Lord *St. Leonards,* and by various other authorities. There must be something more than that kind of default which I have mentioned: there must be, I might almost say, some serious misconduct on the part of the vendor to exempt the purchaser from liability to interest. Here there is nothing of the sort. The purchaser might possibly have exempted himself from interest by investing the purchase-money; he might, and

possibly with success, have refused to be bound by the contract; but he did neither. He went on objecting as to the title, saying once or twice that he objected to pay interest, but, as I have said, not setting apart or appropriating the purchase-money, nor declining specific performance, of which, on the contrary, he appears to have been uniformly desirous, subject only to the wish, the natural wish to escape paying interest, if he could do so. I agree with the Master of the Rolls that, according to the authorities, and according to what must now be considered the settled principles and course of the Court, this is not enough; and therefore, although several years have elapsed after the time fixed for the completion of the purchase, a lapse of time occasioned merely by the defect of the vendor's title, or of the proof of it, that does not exempt the purchaser from paying interest.

Then comes the question of costs. The Master of the Rolls appears to have been of opinion that the suit related mainly or alone to that question of interest which his Lordship decided against the purchaser; but his Lordship does not appear, as far as I collect, to have adverted expressly to the fact that a suit was necessary for the purpose of obtaining the legal estate for the purchaser which the vendor was bound to procure; and I do not see anything which should exempt the vendor from liability to pay the costs of the suit so far. In differing from his Lordship on an appeal upon the question of costs, I think, with great deference to him, that we do not exceed the ordinary course of the Court in these cases, inasmuch as the mode of disposing of the costs as to the question of obtaining the legal estate involves a question of principle.

The general costs, therefore, ought to remain as they are given, but subject to a reduction in respect of the costs of the litigation, so far as it related to the obtaining of the legal estate which it was incumbent on the vendor to obtain. What I mean to say is, that the purchaser should be allowed a certain sum in respect of the costs of the litigation, so far as that is concerned; and as my learned Brother thinks that £50 is the proper sum to be allowed for that purpose, though I myself should have been disposed to say something more, I accede to his view of the case, to which I the more readily accede, because his view is that there should be no costs

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of the appeal, in which I entirely agree. That may make the sum of £50 a very proper sum in point of amount.

With regard to the costs of Mr. *Baggallay's* clients, which have not been provided for, it appears to me right that they should be provided for out of the purchase-money, and that will not at all affect the purchaser. We intend to include their costs below as well as here.

SIR G. J. TURNER, L.J.:—

After carefully looking through the pleadings and evidence in this case, I have come to the same conclusion as my learned Brother. The contract contains a provision that if, "from any cause whatever," completion should not take place on the 24th of June, 1854, the purchaser should pay interest. It must rest upon the purchaser to shew a sufficient cause to take him out of that provision. In all these cases, what is really the position of the parties has to be regarded. The purchaser here alleges that the vendor, at the time when this contract was entered into, knew that the title was under dispute with his brother; but I am satisfied that he had no such knowledge.

The vendor, therefore, entered into the contract on the 27th of March, 1854, supposing that the property was undisputed gavelkind property, and that he was entitled to a moiety of it. The contract provided that the title should be completed, and a conveyance made on the 24th of June, 1854. Very shortly before the 24th of June, a brother of the vendor sets up a claim that the property is not gavelkind, but that he is entitled, as heir-at-law, to the whole of it. The deeds were in the possession of a gentleman of the name of *Rose*, who originally held them for both the brothers, but afterwards acted with the elder brother, and refused to produce them to the vendor, the consequence of which was that the vendor became unable to produce them to the purchaser for verification of the abstract.

What, then, was the position of the parties? I am not aware of any case in which the Court has gone the length of saying that a vendor shall be compelled to enter into litigation with an adverse claimant in order to perfect his title, and so enable himself to complete a contract which he has entered into for sale of the

property. The vendor, however, is bound to complete the contract, and if he does not take the steps which are necessary to enable him to do so, he is liable for damages upon the contract; and heavy damages would be given if, having the means of completing the sale, he should decline to take the proceedings necessary for that purpose. This I take to be the exact position of this case on the 24th of June, 1854. The abstract was to have been delivered within fourteen days from the date of the contract; but on the 18th of April, it had not been delivered, and the purchaser then applied for it. An abstract was then delivered, but it was not perfect, and on the 22nd of April, the purchaser applied for a further abstract, and on the 9th of May, he repeated that application. On the 31st of May, the vendor delivered a further abstract; and applications were made by the vendor to Mr. *Rose*, for production of the deeds to the purchaser. On the 19th of June, the vendor applied for completion, though the purchaser had not had the opportunity of comparing the deeds with the abstract. The purchaser's solicitors declined to complete, by a letter dated the 20th of June, which contained this very remarkable passage: "We take advantage of the opportunity now afforded us for informing you, that as the delay which is likely to take place in completing this purchase, will not rest with our client, who is prepared with his purchase-money, he will decline to pay interest in consequence thereof." Now, anything more absurd on the part of the purchaser, who had entered into a contract that if from any cause whatever the contract were not completed on the 24th of June, he would pay interest, than his saying, that because there has been no production of the deeds to be compared with the abstract four days before the time fixed for the completion of the contract, he will pay no interest on his purchase-money, I cannot conceive. From that time until the year 1864, I cannot find that anything more is said on either side about the interest. The matter goes on without the purchaser's giving any intimation whatever to the vendor that he in any way disputes his liability to the payment of interest, and without his taking any step whatever to appropriate the purchase-money, he all that time remaining in possession of the £9000 purchase-money, and using it in his trade.

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The case attempted to be made on the part of the purchaser is, that there has been so much delay on the part of the vendor as to amount to a wilful default or neglect on his part, which, according to the cases, would suffice to absolve the purchaser from the liability to interest even under the terms of such a contract as the present. But how does the matter stand? No correspondence took place from the 30th of June, 1854, to the 1st of January, 1855, when the purchaser wrote to know when the vendor would complete. No answer, so far as I can find, was ever given to that letter. It does not appear that any further communication took place till the 1st of May, 1856, when the purchaser's solicitor, as it appears, stated to the vendor's solicitor that the purchaser would not take less than £7000 to be off his bargain, and would give £16,000 for the other moiety, if a title could be made to it. So that beyond all question up to the 1st of May, 1856, the purchaser was adhering to the contract. On the 5th of February, 1857, another application was made to the vendor by the purchaser, for inspection of the deeds. On the 26th of that month the vendor's solicitor answered by saying that a bill for a partition had been filed in order to convert the undivided moiety which the purchaser had bought, into a distinct and independent estate. The purchaser having been aware that there was a suit pending for partition, and having taken no steps to determine the contract, cannot be considered to have done otherwise than acquiesce in the pendency of that suit. It was quite within his power to say, If you do not complete within a certain time, I shall put an end to the contract; he never did so, but allowed the suit to go on, the effect of which would be to give him an entire and independent estate at the expense of the vendor. The next event which occurred was on the 24th of March, 1858, when the vendor died. On the 21st of June, 1858, the purchaser again applied to know when the title would be completed, and on the 2nd of January, 1860, there was another application of the same description. On the 10th of August, 1860, the purchaser applied for a further abstract, still adhering to the contract. On the 1st of March, 1861, a bill of revivor was filed in the partition suit, and on the 20th of May, 1861, a meeting took place between the solicitors of the vendor's representative and the purchaser upon the subject,

and it was agreed that the purchaser should be made a party to the suit for partition at his own instance, and on the demand of his own solicitors. Although the purchaser may have made a continual claim, and expressed a continual desire to have the contract completed, yet he never took any actual steps to bring the matter to an immediate conclusion; on the contrary, he acquiesced, as it seems to me, in the steps taken for the purpose of completing the title, and I cannot think that he has established as against the vendor any case of wilful delay or want of *bona fides*. I do not say that there were not casual and temporary delays at different times; but I think that all such delay was cured by the conduct of the purchaser in adhering to the contract, and concurring with the vendor in the steps which were taken for the completion of the title by becoming a party to the partition suit.

There remains, then, only the question of costs, and I cannot go the length which the Master of the Rolls has gone, in saying that the purchaser ought to be made to pay the whole costs of the suit, when the suit in part relates to the getting in of the legal estate, in order to put the Plaintiffs in a position to complete the purchase. I think that the purchaser has been rightly charged with the costs of the suit, so far as respects the interest; but I think that he has been wrongly charged with them so far as the suit relates to getting in the legal estate from the infants. I think it is quite unnecessary to give any opinion upon the difference made in some of the authorities between the case of a vendor's devising the estate to an infant, and suffering it to descend to an infant; because I consider the present case to be taken out of any general rule by the fact, that the completion of the purchase was postponed as much for the convenience of the purchaser as of the vendor. I therefore am of opinion, that so far as the suit related to getting in the legal estate from the infants, the purchaser ought neither to receive nor pay costs. I think that the best course will be, instead of directing an apportionment of costs, to say that £50 shall be deducted from the costs which the purchaser has been ordered to pay, and that there shall be no costs of the appeal.

Solicitors for the Appellant: Messrs. *Kingsford & Dorman.*
Solicitors for the Respondent: Messrs. *Lethbridge & Mackrell.*

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DE BEAUVOIR *v.* BENYON.

Heir-at-law—Inquiry.

A testator gave real and personal estate to *R. B.* for life, remainder to his sons successively in tail, remainder to his own right heirs. *R. B.* died without issue, and claiming to be the testator's heir-at-law, disposed of the testator's property by will. After his death the testator's sole next of kin filed a bill to recover the personal estate from *R. B.*'s executors, who were also the personal representatives of the testator, alleging that the testator left no heir-at-law, or that if he did it could not be ascertained who was such heir-at-law, and that there was an intestacy as to the personal estate. *R. B.*'s executors entered into evidence depending on a long and complicated pedigree to prove that *R. B.* was heir. The evidence did not establish this, but shewed that the testator must have left an heir. The Plaintiff did not go into evidence.

Held, affirming the decree of the Master of the Rolls, that the Plaintiff was not entitled as of right to an inquiry, whether there was an heir-at-law, but that the Court would at the hearing determine upon the evidence, whether there was ground for such an inquiry, and that as the evidence sufficiently shewed that there must have been an heir-at-law, the bill must be dismissed.

THIS was an appeal by the Plaintiff from an order of the Master of the Rolls dismissing the bill.

The Rev. *Peter Beauvoir*, by will dated the 27th of July, 1800, gave real and personal estate to *Edward Benyon* for life, remainder to his first and other sons successively in tail male, with remainder to *Charles Benyon* for life, with remainder to his first and other sons successively in tail male, with remainder to *Richard Benyon* (afterwards *Richard Benyon de Beauvoir*) for life, with remainder to his first and other sons successively in tail male, and in default of such issue, to his, the testator's own right heirs. The testator appointed the above-named *Richard Benyon* and *Martin Whish* his executors.

The testator died in 1821. *Edward Benyon* and *Charles Benyon* had died without issue in his life; and upon his death *Richard Benyon* and *Martin Whish* proved his will. *Richard Benyon* entered into possession of the testator's real estate or receipt of the rents, and possessed himself of his personal estate, and assumed the name of *De Beauvoir*. He never had any son.

The Plaintiff in the present suit was the legal personal repre-

sentative of his deceased wife, who was the sole next of kin of the testator at his death; but being a relation of the half blood, was not his heiress-at-law.

In 1846, the Plaintiff filed his bill to establish his title, as representative of his wife, to the personal estate of the testator upon the death of *Richard Benyon de Beauvoir*, on the ground that the ultimate limitation to the heirs-at-law carried the personal estate to the next of kin. It was, however, ultimately decided by the House of Lords that the effect of that gift was to carry the personal as well as the real estate to the heir-at-law: *De Beauvoir* v. *De Beauvoir* (1).

In the year 1854, *Richard Benyon de Beauvoir*, the tenant for life under the will, died without issue. He claimed to be the testator's heir-at-law, and left a will by which he disposed of the testator's real estate as an owner in fee, and also disposed of the testator's personal estate. He was the surviving executor of the testator.

The testator left no near relation of the whole blood, and it was not known with certainty who was his heir-at-law. The Plaintiff, in December, 1861, filed his bill against the executors of *Richard Benyon de Beauvoir*, to recover the testator's personal estate, alleging that the testator left no heir, or that if he did, it could not be ascertained who was such heir, and that therefore the gift to the testator's right heirs had failed, and the title of the next of kin to the personal estate was let in. The bill also stated two releases which had been executed by the Plaintiff, which the Plaintiff alleged not to cover his present claim. The Lord Justice *Knight Bruce* gave no opinion on this part of the case, which was argued at great length; but the Lord Justice *Turner* was of opinion that the second release extinguished any claims which the Plaintiff might or would have had. This question, however, turned so completely on special circumstances, that it is not thought useful to notice it further.

The Defendants entered into evidence to prove that *Richard Benyon de Beauvoir* was the testator's heir-at-law. His heirship depended on a very long and complicated pedigree. It is sufficient to state that in the opinion of both their Lordships the evidence of

(1) 3 H. L. C. 524.

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the Defendants did not shew whether *Richard Benyon de Beauvoir* was the testator's heir-at-law or not, but satisfactorily established that the state of the family was such that there must have been an heir-at-law. This evidence was wholly uncontradicted, the Plaintiff not having entered into evidence on the subject

The Master of the Rolls having dismissed the bill, the Plaintiff appealed.

Mr. *T. H. Terrell*, and Mr. *Karslake*, for the Plaintiff:—

We submit that the Master of the Rolls was in error in deciding that it was necessary for us to establish our title at the hearing by proving that there was no heir-at-law of the testator at his death. The case is like that of an heir-at-law bringing ejectment; he is only bound to prove that he is heir, not to prove that there is no will; it lies on the other side to displace his title as heir. Here we contend that our title as next of kin being clearly proved, the Defendant must shew who the testator's heir was. *Richard Benyon de Beauvoir* was the testator's legal personal representative; his executors are in the same position, they stand in a fiduciary position towards all persons claiming under the testator, and cannot, as a stranger might do, say that they will hold the property till some one proves at the hearing a beneficial title to it as against them, and displaces the beneficial title which they set up. They must prove that there is some one other than the Plaintiff who is the person entitled. It is not enough for the Defendants to shew that there must have been an heir of the testator, for if the heir-at-law cannot be ascertained, the Plaintiff must take the property as undisposed of: *Underwood* v. *Wing* (1). We submit, therefore, that an inquiry ought to have been directed, whether there was any heir-at-law of the testator at his death, and who was such heir-at-law. The point is not one to be entered into at the hearing, but only proper for an inquiry in Chambers, and evidence ought not to have been adduced upon it.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the Defendant:—

We do not deny that if there was no heir the Plaintiff is entitled; but we say that the Plaintiff has no title if there was any

(1) 4 D. M. & G. 633; 8 H. L. C. 183.

heir. Not only has he not shewn that there was not, but our uncontradicted evidence, if it falls short of proving that *Richard Benyon de Beauvoir* is heir, at all events shews conclusively that there was an heir. The Plaintiff cannot have an inquiry without shewing a *primâ facie* title, and we have a right to adduce evidence at the hearing to shew that he has not any such *primâ facie* case as to entitle him to an inquiry.

Mr. *Terrell*, in reply :—

Suppose a testator to bequeath his property to designated persons, if one of the next of kin files a bill, it lies on the executor to prove their existence, not on the Plaintiff to prove their non-existence; it not being the course of Courts of justice to put a Plaintiff to prove a negative. Evidence as to heirship depending on a long and complicated pedigree is not to be adduced at the hearing. Such a point cannot be investigated properly in Court, for it requires careful examination of the original certificates and other documents produced in support of the pedigree. An inquiry, therefore, is almost of course.

Sir J. L. Knight Bruce, L.J. :—

In this case there are several points of the defence on which I think it unnecessary to express, and shall abstain from expressing, any opinion. The bill is filed by the personal representative of a lady who was the sole next of kin of the testator in the cause, at the time of his death, and claims his residuary personal estate on the alleged ground that, though there were several valid bequests in succession of the residuary personal estate, the ultimate gift of that residue in favour of the testator's heirs-at-law, by which description were meant, according to the decision of the House of Lords, *designatæ personæ*, failed to take effect, because, as the Plaintiff alleges, there was no heir-at-law of the testator at his death, an allegation which must include also the allegation that there were no co-heirs at that time. Now, the allegation that the testator left no heir-at-law is denied. It is stated distinctly on the part of the defence, that the testator did leave an heir-at-law, and evidence is gone into in support of that contention. The evidence given —given after notice that the allegation upon which the Plaintiff's

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title depends was denied—the evidence given appears, in my judgment, to prove, not who was the heir-at-law, but that the state of the family was such that there must have been an heir-at-law of the testator living at his death. That, in my opinion, is established, and if established, the Plaintiff's title wholly fails. Now, the Plaintiff having notice that the allegation upon which his supposed title to the residue is founded was denied, has not thought fit to go into any evidence on the subject. He has left a matter provable, according to the course of the Court and of law, by evidence, to rest upon the evidence on the part of the Defendant alone; he has not gone into any kind of proof in support of the allegation that there was no heir. It is said that it was not necessary for him to do so; that this is a case in which an inquiry is of right, according to the course of the Court, and that, therefore, it was not necessary to go into evidence. I respectfully differ from that conclusion. According to my conception, this is not a case upon which the Defendant was precluded from going effectually into evidence, or upon which there is a right, on the part of the Plaintiff, to an inquiry, whatever may be the state of the evidence. I repeat that, in my judgment, the point is one upon which the Defendant had a right to go into evidence. He has gone into evidence, which has proved, in my judgment, most satisfactorily, not who was the heir-at-law, but that the state of the family was such that there must have been some heir-at-law at the time of the death. That is fatal to the claim of the Plaintiff. There is no case, in my opinion, for an inquiry. The alleged title upon which the Plaintiff proceeds is altogether precluded by the evidence, on the part of the Defendant. The inquiry, I think, would be something more than the Plaintiff is entitled to, and would give the Defendant less than justice. Without, therefore, I repeat, going into any other points of the defence, I think that, for the reasons I have stated, the present bill must remain dismissed, and the appeal must be also dismissed.

Sir J. G. Turner, L.J.:—

I entirely agree with my learned Brother in the observations he has made on this case. As regards the right of the Plaintiff to file this bill I do not in any way dispute it; but to say that the Court,

though it has evidence before it satisfying it that there was an heir of the testator living at the time of his death, is bound to direct an inquiry whether there was or was not such an heir, appears to me an utterly unfounded contention. I think that the duty of the Court is to form its judgment at the hearing upon the evidence, and decide whether a case for inquiry is established or not. On the evidence before us I think that the Court could not properly come to any other conclusion than that there was an heir-at-law of the testator living at his death, and that no case for inquiry on the subject is established. I agree, therefore, that the appeal ought to be dismissed.

Solicitors for the Plaintiff: Messrs. *Bevan & Whitting.*
Solicitors for the Defendant: Messrs. *Lake, Kendall, & Lake.*

MOORE *v.* MARRABLE.

Specific performance—Agreement for Lease—Substitution of Tenant.

In August, 1856, the Plaintiff agreed to let a house to the Defendant for seven, fourteen, or twenty-one years, the Defendant to keep the premises in repair, and paint and paper as therein mentioned, and the Defendant was let into possession. In 1859 the Plaintiff agreed with the Defendant to accept a Mr. *Williams* as tenant in his room upon the same terms, the Defendant guaranteeing the rent. *Williams* had just before this been let into possession by the Defendant, and he paid rent till 1863. In that year the Defendant gave a notice to determine his tenancy at the end of the first seven years. *Williams* and the Defendant having both denied their liability to paint and paper according to the terms of the original agreement, the Plaintiff in November, 1864, filed his bill to compel the Defendant to accept a lease:—

Held, reversing the decree of the Master of the Rolls, that the Defendant could not be compelled to accept a lease.

Per TURNER, L.J.:—The agreement of 1859 was substitutionary for the agreement of 1856, and although the Plaintiff, if he had within a reasonable time called upon the Defendant to procure *Williams* to take the lease, would probably, upon the Defendant failing to do so, have been entitled to call for performance of the original agreement, he was not so entitled after the time which had elapsed, and *semble* the Defendant's notice in 1863 would have been sufficient to prevent specific performance.

THIS was an appeal by the Defendant from a decree of the Master of the Rolls.

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The bill was filed for the specific performance of an agreement dated the 12th of August, 1856, made between the Plaintiff of the one part and the Defendant of the other part, by which the Plaintiff agreed to let, and the Defendant to take, a messuage called *Malvern Villa*, for a term of seven, fourteen, or twenty-one years, from the 29th of September, 1856, at the yearly rent of £100, and the Defendant agreed to keep the premises in repair, and to paint outside every three years, and inside every seven years, and ornament, paint and paper them as therein mentioned, and not to underlet them without the Plaintiff's consent, and forthwith to execute a lease and counterpart.

In pursuance of this agreement, the Defendant entered into possession of the premises, and continued in possession of them until the month of August, 1859, holding under the agreement without any lease having been made to him. In the month of August, 1859, he entered into a negotiation with one *Henry Williams*, for the transfer to him of the agreement, and this negotiation led to communications and correspondence between him and the Plaintiff, the details of which it is not material to state. In the result a further agreement was come to between the Defendant and the Plaintiff, which was dated the 12th October, 1859, and was in these terms: "Mr. *Moore* agrees to accept Mr. *Henry Williams* as his tenant of *Malvern Villa* in lieu of Mr. *Marrable*, and on the same terms and conditions, and to grant him an agreement for a lease of the said house for four, eleven, or eighteen years, from Michaelmas last, Mr. *Marrable* undertaking to give Mr. *Moore* a guarantee for the rent during Mr. *Williams's* tenancy."

A day or two before the date of this agreement, *Williams* had been let into possession of the premises, under an agreement between him and the Defendant, by which he had agreed to take an assignment of the Defendant's agreement with the Plaintiff, provided the Plaintiff would consent, and on certain conditions as to some decorative repairs being done by the Defendant.

Shortly after the date of this agreement the Plaintiff, at the request of the Defendant, sent him the draft of the lease which he proposed to grant, being a lease to *Williams*, to which the Defendant was made a party, for the term of four, eleven, or

eighteen years, with covenants by the Defendant and *Williams* for the payment of the rent, and for the repairs, painting, and papering, stipulated for by the original agreement between the Plaintiff and the Defendant. The Defendant, upon the receipt of this draft, made some alterations in it, and struck out his name as one of the parties to it, and he then forwarded it to *Williams*, but it did not appear that the Plaintiff was informed of the Defendant's having struck out his name from the draft, although he was told that some parts of it had been struck out, as not being mentioned in the original agreement. At the time when the draft lease was thus forwarded to *Williams*, he was on the point of going to America. He did not approve of the draft, but returned it to the Defendant, desiring that the matter might stand over until he returned. *Williams*, when he went to America, left his wife in the occupation of the villa. She paid the three following quarters' rent to the Defendant, who handed it over to the Plaintiff, but subsequently she paid the rent to the Plaintiff, who gave receipts for it as on account of the Defendant, and this course of payment appeared to have continued for some time after the year 1860, when *Williams*, as it appeared, returned to this country. On the 9th of March, 1863, the Defendant wrote to the Plaintiff in these terms:—

"9th March, 1863.

"MY DEAR SIR,—As the first seven years of the lease of *Malvern Villa, Eldon Road, Kensington*, will expire at Lady-day next, I beg to give you notice that it is not my intention any longer to remain your tenant of that house. I have not the slightest wish to interfere with any arrangement that may exist between you and Mr. *Williams*, nor have I written to him on the subject, nor do I intend to do so, if you will kindly acknowledge the receipt of this letter, and inform me that I am no longer responsible in any way. I write this as a matter of form and precaution, as I believe all my responsibility has long ago ceased. With compliments to Mrs. *Moore*, I remain, my dear Sir, very truly yours,

"F. MARRABLE.

"*David Moore, Esq.*"

The Plaintiff, being unable to get either *Williams* or *Marrable* to do the painting, papering and repairs, according to the terms

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of the original agreement, filed the present bill on the 30th of November, 1864, against *Marrable* alone, for the specific performance of the agreement of the 12th of August, 1856. The Defendant, by his answer to the bill, relied upon the agreement of the 12th of October, 1859, as having cancelled the original agreement, and he insisted that even if the original agreement was not cancelled, the Plaintiff had lost any right which he might otherwise have had to relief by lapse of time, and by the determination of the term for which the lease, if granted, would have been good against him. The evidence in the cause consisted mainly of the affidavits of the Plaintiff and of the Defendant.

The Plaintiff deposed as follows as to the memorandum of the 12th of October, 1859 :—"I met the Defendant by appointment on Wednesday, the 12th of October, 1859, and I then agreed with the Defendant to grant, at his request, an agreement for a lease to the said *Henry Williams*, and I say that, although it is the fact that the Defendant was to guarantee the rent, that being the matter of greatest consequence, yet it was never agreed or understood by me that the Defendant was to be released from any of his other obligations under his agreement with me. And I say, at the conclusion of our conversation, the Defendant wrote down the memorandum of the 12th of October, 1859, in his said answer stated, and requested me to sign the same, which I did, without very closely weighing the words of such memorandum. I say that, if the construction of such memorandum is that the said *Frederick Marrable* was to be released from all his obligations, except as to the payment of rent, that such agreement does not truly express what was agreed to by me, and that my signature thereto was obtained by surprise; but, nevertheless, I say that in point of fact, if such last-mentioned memorandum bears the construction that the Defendant puts on it, or is binding on me, then I say that such memorandum was a memorandum of agreement between me and the Defendant to which the said *Henry Williams* was no party, and that the Defendant never procured the said *Henry Williams* to take a lease of the said premises from me."

The Defendant, on the other hand, by his answer with reference to the same agreement, stated as follows :—

"After some further correspondence and interviews between the

Plaintiff and me, a clear and distinct understanding was entered into between us, that instead of Mr. *Williams* taking an assignment of the said agreement, he was to become directly the tenant and lessee of the Plaintiff in lieu of me, as if the name of Mr. *Williams* had been inserted in the said memorandum instead of mine, but that I was to give the Plaintiff a guarantee for the payment of the rent, and accordingly the Plaintiff wrote and gave me another memorandum as follows, that is to say :—"

[Here followed the memorandum of the 12th of March, 1859.]

The Master of the Rolls on the hearing of the cause decreed specific performance of the agreement of the 12th of August, 1856, with costs. The Defendant appealed.

Mr. *Southgate*, Q.C., and Mr. *Archibald Smith*, in support of the decree :—

The Defendant must either take the lease himself, according to his original agreement, or procure *Williams* to take it; the agreement to accept a new tenant in lieu of the old being conditional on the new one coming in. The result of a contrary conclusion would be most unjust, for as there is no privity of contract between the Plaintiff and *Williams*, the Plaintiff cannot compel *Williams* to take a lease.

Mr. *Selwyn*, Q.C., and Mr. *J. N. Higgins*, for the Appellant :—

This is a bill filed for performance of an agreement five years after the substitution for it of another agreement. The Defendant's tenancy was put an end to by the notice of the 9th of March, 1863, the option to determine it at the end of seven years being with him: *Dann* v. *Spurrier* (1), and there cannot be specific performance after the end of the term: *Walters* v. *Northern Coal Mining Company* (2). Even if the original agreement was not put an end to by that of the 12th of October, 1859, the Plaintiff cannot have specific performance of it after such delay and acquiescence: *Heaphy* v. *Hill* (3); *Southcomb* v. *Bishop of Exeter* (4).

Mr. *Southgate*, in reply.

(1) 7 Ves. 231.
(2) 5 D. M. & G. 629, 638.
(3) 2 S. & S. 29.
(4) 6 Hare, 213.

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Jan. 23. SIR J. L. KNIGHT BRUCE, L.J.:—

With all deference to the Master of the Rolls, the Plaintiff, in my opinion, has by his acts and conduct so complicated and entangled matters in connection with this house as to render specific performance impossible.

SIR J. G. TURNER, L.J.:—

The material questions upon this appeal seem to me to be, what was the effect of the agreement of the 12th of October, 1859, and how the case is affected by the conduct of the parties since that date. As to the effect of that agreement, considered simply with reference to the terms of it, there cannot, I think, be any doubt. Under the agreement of the 12th of August, 1856, the Defendant would have been liable for the rent and upon the covenants during the whole term of the lease; but by the agreement of the 12th of October, 1859, he was to be liable for the rent only, and not upon the covenants. The two agreements, therefore, could not stand together, and upon the face of them, the latter cannot be considered otherwise than as a substitution for the former.

[His Lordship then stated the evidence of the Plaintiff and Defendant which is set out above].

Here, then, there arises a material difference between the parties as to what was intended to be done; but the agreement itself is clear upon the point: it is that the Plaintiff is to accept *Williams* as tenant in lieu of the Defendant, and although, perhaps, there is not much in the conduct of the Plaintiff to corroborate this view, what he says in his cross-examination goes far to support it; and there is not, so far as I can find, anything in his conduct which is inconsistent with it. There is nothing, therefore, which, in my opinion, can countervail the express terms of the agreement. As to the case of surprise which the Plaintiff alleges, I can see no foundation for it.

The only remaining question, then, is as to the effect of the Defendant not having procured *Williams* to take the lease. Upon this I for some time doubted, and, certainly, I am not prepared to say that if the Plaintiff had, within any reasonable time after the date of the agreement of the 12th of October, 1859, called

upon the Defendant to procure *Williams* to execute the lease, he might not upon the Defendant's having failed to do so, have insisted upon the performance of the original agreement; but the Plaintiff did not do this; he allowed matters to rest as they were until the year 1863, and he did not file his bill until the end of 1864; and I do not think that, after this lapse of time, it was competent to him to treat the agreement of the 12th of October, 1859, as a nullity, and revert to his rights under the original agreement. I may add, that the notice contained in the letter of the 9th of March, 1863, which, although expressed to be for the determination of the tenancy under the original agreement at Lady-day, 1863, must have been intended, and known to have been intended, to be for the determination of it at Michaelmas, 1863, when the first seven years expired, seems to me to furnish very strong, if not conclusive, ground against the Plaintiff's right to the specific performance of the original agreement. Upon the whole, therefore, with all respect to the Master of the Rolls, my opinion is that this decree cannot be maintained, and that this bill ought to have been, and ought now to be, dismissed; but I think it should be dismissed without costs, and without prejudice to any remedy at law, and of course there will be no costs of the appeal.

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Solicitors for the Plaintiff: Messrs. *Coode, Kingdon, & Cotton.*
Solicitor for the Defendant: Mr. *St. Barbe Sladen.*

GLAHOLM *v.* BARKER.

Shipping—Collision—Lord Campbell's Act—Merchant Shipping Acts.

L. JJ. 1865. *Dec.* 7; *Jan.* 18, 1866.

The *Merchant Shipping Repeal Act*, 1854, which repeals all Acts and parts of Acts inconsistent with the *Merchant Shipping Act*, 1854, has not the effect of importing into Lord *Campbell's* Act the limitation contained in the *Merchant Shipping Act*, 1854, of a shipowner's liability for loss of life occasioned by collision, so as to keep that limitation in force notwithstanding the repeal of the last-mentioned Act, but such liability is now subject only to the limitations contained in the *Merchant Shipping Act*, 1862.

Appeal from the Master of the Rolls dismissed.

THIS was an appeal from a decree of the Master of the Rolls. The Plaintiffs were the owners of a brig called the "Edith

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Mary," which in Feb., 1864, came into collision with a vessel called the "Thomas Barker," and sunk her. The crew consisted of ten persons, of whom eight were drowned. The bill was filed against *Thomas Barker*, the owner of the sunken vessel; the personal representatives of such of the drowned seamen as had left personal representatives; and the owners of the cargo. It alleged claims by *Thomas Barker* for the loss sustained by him, actions by the representatives of the drowned seamen for the loss of their lives and of their clothes and property on board, and a claim by the owners of the cargo for the loss of the cargo, and prayed that the amount of the Plaintiffs' liability in respect of the above matters, according to the *Merchant Shipping Amendment Act*, 1862, might be declared and distributed between the Defendants and all other persons who should establish claims against the Plaintiffs in respect of the above matters under the direction of this Court; and that in the meantime the Defendants might respectively be restrained from the actions already commenced, and from commencing any other actions against the Plaintiffs touching the above matters. All claims except those in respect of the loss of life were settled before the hearing. The Master of the Rolls, by his decree, declared that the Plaintiffs were liable for damages to an amount not exceeding £15 per registered ton of the "Edith Mary," and gave directions consequent upon this declaration, making due allowance to the Plaintiffs for all the sums they had paid. The Plaintiffs appealed from the decree so far as respected this declaration and the directions consequent thereon. The material clauses of three of the Acts upon which the arguments turned are referred to below (1).

(1) The *Merchant Shipping Act*, 1854, 17 & 18 Vict. c. 104.:

Section 504. No owner of any sea-going ship, or share therein, shall, in cases where all or any of the following events occur without his actual fault or privity, (that is to say,)

. . . . .

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;

(4.) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat;

be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or

(1) See 11 Jur. N.S. 434; 13 W.R. 671.

Mr. *Hobhouse*, Q.C., and Mr. *Druce*, for the Appellants:—

There was no pecuniary liability for causing a person's death till Lord *Campbell's* Act, 9 & 10 Vict. c. 93. Before that Act, the liability of a shipowner for damage done to another ship and its cargo by collision was limited to the value of his ship and its freight; his liability for personal injuries not ending fatally was unlimited, but for personal injuries ending fatally he was under no liability. After the passing of Lord *Campbell's* Act, his liability for injuries causing death was unlimited. The *Merchant Shipping Act*, 1854, limits his liability on all accounts to the value of his

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contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to *any passenger*, shall the value of any such ship and the freight thereof be taken to be less than fifteen pounds per registered ton.

Section 505 contains provisions as to estimating freight.

The *Merchant Shipping Repeal Act*, 1854, 17 & 18 Vict. c. 120:

Section 4. There shall be hereby repealed the several Acts and parts of Acts set forth in the first schedule hereto to the extent to which such Acts or parts of Acts are therein expressed to be repealed and all such provisions of any other Acts or of any Charters, and all such laws, customs and rules as are inconsistent with the provisions of the *Merchant Shipping Act*, 1854.

Provided that such repeal shall not affect—(Here follow a number of exceptions not bearing upon the present question.)

Lord *Campbell's* Act is not mentioned in the first schedule to this Act.

The *Merchant Shipping Act Amendment Act*, 1862 (25 & 26 Vict. c. 63), repealed the 504th and 505th sections of the *Merchant Shipping Act*, 1854, and by the 54th section enacted as follows:—

Section 54. The owners of any ship whether British or Foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

. . . . .

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;

(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing-ships, and in the case of steam-ships the gross tonnage without deduction on account of engine room.

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ship and its freight, subject to a proviso that, if a passenger is killed or injured, the value of the ship and freight shall not be taken at less than £15 per ton. The *Merchant Shipping Repeal Act*, 1854, repeals all Acts and parts of Acts inconsistent with the *Merchant Shipping Act*. Lord *Campbell's* Act is inconsistent with this provision, for it gives full damages; and there is a manifest inconsistency between this and an Act which says there shall not be full damages, but something else. Now, the 504th section of the *Merchant Shipping Act* is purely negative, it creates no liability. Lord *Campbell's* Act, therefore, so far as regards liability for collisions at sea, was repealed; and the repeal of the *Merchant Shipping Act*, 1854, does not revive it: 13 & 14 Vict. c. 21. But if this be not the correct view, then we say that the effect of the *Repeal Act* of 1854 was to engraft into Lord *Campbell's* Act a proviso that the shipowner should not be liable to more than the value of his ship and freight, unless in the case where a passenger was injured or killed. This proviso depends on the *Repeal Act*, not on the *Merchant Shipping Act*, and is not affected by the repeal of the *Merchant Shipping Act*, for the *Repeal Act* of 1854 repeals Lord *Campbell's* Act, not so far as it shall be inconsistent with such Acts as shall for the time being be in force with respect to merchant shipping, but so far as it is inconsistent with the provisions of the Act of 1854. It therefore permanently engrafts on Lord *Campbell's* Act the provisions of the *Merchant Shipping Act*, 1854, and it has never been repealed, though the *Merchant Shipping Act* has; and even if it had been repealed, the partial repeal by it of Lord *Campbell's* Act would remain unaffected: 13 & 14 Vict. c. 21.

Mr. *Osborne*, Q.C., and Mr. *Haddan*, in support of the decree:—

There is no such inconsistency between Lord *Campbell's* Act and the *Merchant Shipping Act*, 1854, as to make the *Repeal Act* of 1854 have the effect contended for. The first section of Lord *Campbell's* Act says nothing about the quantum of damages, but gives a right to bring an action; a limit is set to this right by the *Merchant Shipping Act*, 1854. That Act having been repealed, the limit fixed by it is removed, and the only limit now is that fixed by the Act of 1862. Moreover, the terms of the Act

of 1862 are enough of themselves to create the liability for which we contend, without the aid of Lord *Campbell's* Act. If, however, we are thrown upon the Act of 1854, we contend that "passenger" includes a seaman: *The Fusilier* (1). The Plaintiffs are liable up to £15 per ton. [*Nixon* v. *Roberts* (2), and *Dobree* v. *Schroder* (3), were also referred to.]

Mr. *Hobhouse*, in reply.

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Jan. 18th. SIR G. J. TURNER, L.J., after stating the facts, proceeded as follows:—

The appeal is by the Plaintiffs from this decree, so far as respects the declaration and the directions consequent upon it. In the course of the arguments upon this appeal, several Acts of Parliament were brought under our consideration; Lord *Campbell's* Act, 9 & 10 Vict. c. 93; the *Merchant Shipping Act*, 1854, 17 & 18 Vict. c. 104; the *Merchant Shipping Repeal Act*, 1854, 17 & 18 Vict. c. 120; and the *Merchant Shipping Act Amendment Act*, 1862, 25 & 26 Vict. c. 63; and the Act, 13 & 14 Vict. c. 21 was also referred to. It is upon the provisions of these Acts, and as I think, for the reasons which I shall presently state, upon the provisions of the four first of them, our determination of this case must depend, the remedy in such cases as the present being, as was properly observed at the bar, altogether statutory. In dealing with this case, it will be convenient to refer to these statutes in their order of date. Lord *Campbell's* Act first introduced into the law of this country a remedy in case of injuries attended with the loss of life; the law up to the time of the passing of this Act having stood thus—that in case of death resulting from injury the remedy for the injury died with the person. As to this Act, it is sufficient for the present purpose to say that it is expressed in the most general and comprehensive terms; and that, looking to the terms of it, there can be no reasonable doubt that it was meant to extend, and must be considered to have extended, to loss of life resulting from collisions

(1) 11 Jur. N.S. 289, P. C. (2) 1 J. & H. 739.
(3) 6 Sim. 291; 2 M. & C. 489.

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at sea, no less than from other causes. After the passing of this statute, therefore, the owners of sea-going vessels were liable for loss of life arising from collision to any amount which a jury might assess as the value of the life. This was the state of the law when the *Merchant Shipping Act*, 1854, was passed. [His Lordship then stated the several parts of Acts set out in the preceding note.]

That the provisions of these statutes involve cases of this description in some perplexity cannot, I think, be denied; but it does not seem to me that the perplexity is incapable of being unravelled. It was first argued for the Appellants that the provisions of Lord *Campbell's* Act being, as it was insisted, inconsistent with the provisions of the *Merchant Shipping Act*, 1854, the 4th section of the *Merchant Shipping Repeal Act*, 1854, must be taken to have repealed Lord *Campbell's* Act, and that no obligation upon the owners of ships was created by the *Merchant Shipping Act*, 1854, the provisions of that Act being in the negative, merely that the owners should not be liable beyond the amounts specified in the Act; and on the other hand it was argued on the part of the Respondents that the *Merchant Shipping Act*, 1854, of itself, and independently of Lord *Campbell's* Act, created a liability in the owners of ships to the extent referred to in the Act. Upon this question, whether the *Merchant Shipping Act*, 1854, ought to be construed as having of itself, and independently of Lord *Campbell's* Act, created a liability in the owners of ships to the extent contended for, or otherwise, I do not think it necessary for us to give any opinion; for, looking to the course of legislation to which I have referred, I am quite satisfied that the 4th section of the *Merchant Shipping Repeal Act*, 1854, was not intended to repeal, and did not repeal, Lord *Campbell's* Act, but was intended and operated only to modify the liability which attached upon the owners of ships under the provisions of that Act. The language of this 4th section does not seem to me to be in any degree inconsistent with this view. It first purports to repeal the Acts and parts of Acts mentioned in the schedule to the extent to which they are therein expressed to be repealed; and there is no mention whatever in the schedule of Lord *Campbell's* Act, although some of the Acts there specified are repealed as to particular subjects, and it

would obviously have been perfectly easy to specify the subject as to which Lord *Campbell's* Act was to be repealed, if it had been intended to repeal it. The section then further purports to repeal all such provisions of other Acts as are inconsistent with the provisions of the *Merchant Shipping Act*, 1854; but the provisions of Lord *Campbell's* Act are not inconsistent with the provisions of the *Merchant Shipping Act*, 1854, except in so far as damages might be recoverable under the former Act beyond the limit which is specified in the latter. Besides, it is scarcely possible to suppose that the Legislature, if it intended to repeal Lord *Campbell's* Act, should have omitted to provide in express terms the more limited remedy referred to in the *Merchant Shipping Act*, 1854. I am of opinion, therefore, that the Appellants' argument on this point cannot be maintained.

But then a further argument was raised on their behalf, for which we are indebted to the ingenuity of Mr. *Druce*. He argued that, assuming Lord *Campbell's* Act to be modified only by the 504th and 505th sections of the *Merchant Shipping Act*, 1854, and not repealed by the *Merchant Shipping Repeal Act*, 1854, the modifications introduced by the above sections ought to be taken to have been incorporated into Lord *Campbell's* Act, and that, being so incorporated, they must subsist notwithstanding the repeal of the above sections by the *Merchant Shipping Amendment Act*. I must confess that in the complication of these Acts I felt at the time when this case was argued in some degree embarrassed by this argument; but on considering it I am satisfied that it cannot be supported. The modification introduced by these sections is not in terms incorporated into Lord *Campbell's* Act. It must, no doubt, have affected that Act so long as it subsisted, but when it was destroyed, its effect must have ceased. Otherwise, the consequence would be, that where any provision of an Act of Parliament has been modified by a subsequent Act, the modification would not be altered without at the same time repealing or altering the original Act, a proposition which cannot, I think, be maintained. With respect to the Act 13 & 14 Vict. c. 21, providing that where a statute which has repealed other statutes is itself repealed, the repeal of it shall not, without express enactment, operate to revive the statutes which have been repealed by it, a provision on

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which some argument was attempted to be raised on the part of the Appellants, I do not think it has any bearing on this case, there not being, in my opinion, as I have already stated, any repeal of Lord *Campbell's* Act. The argument on the part of the Appellants upon this point, if pushed to its consequences, would go to this length, that Lord *Campbell's* Act was repealed by the *Merchant Shipping Act*, 1854, sections 504 and 505, and was not revived by the repeal of those sections by the *Merchant Shipping Amendment Act*, 1862; and that these latter Acts being in the negative only, the Respondents would have no remedy, a consequence which, in my opinion, goes far, independently of what has been already said, to shew that it was not intended to repeal Lord *Campbell's* Act, or that, if it was so intended, it was intended also that the subsequent Acts, although expressed in the negative, should operate in the affirmative, either of which views would be fatal to this appeal.

The Appellants also placed some reliance on the general policy of the law in favour of the shipping interest, as evidenced by early Acts limiting the liability of shipowners; but these Acts were prior to the passing of Lord *Campbell's* Act, and were repealed by the *Merchant Shipping Repeal Act*, 1854. They furnish, therefore, no evidence of the policy of the law after the passing of Lord *Campbell's* Act, except that the repeal of them is certainly not favourable to the Appellants' views. I may add, too, that we can only judge of the policy of an Act of Parliament from the words in which it is expressed.

For the reasons which I have stated, my opinion is that this appeal is altogether groundless, and ought to be dismissed with costs.

SIR J. L. KNIGHT BRUCE, L.J.:—I am of the same opinion.

Solicitor for the Plaintiffs: Mr. *Hickin*.
Solicitors for the Defendants: Messrs. *Young, Maples, & Co.*

In re LEEDS BANKING COMPANY.

FEARNSIDE AND DEAN'S CASE.

DOBSON'S CASE.

L. JJ.
1865
Dec. 15;
Jan. 17, 1866.

Joint Stock Company—Winding up—Contributory—Shares taken by Executors —Personal Liability of Executors.

The directors of a Joint Stock Company offered their reserved shares to shareholders and the executors of deceased shareholders, in proportion to the amount of their original shares:—

Held, reversing the decision of *Kindersley*, V.C., that executors who accepted shares must be put upon the list of contributories in their own right, and not in their representative character.

The fact that the new shares were offered to, and accepted by, the executors in their representative character, and that the directors had no power to offer the shares to them in any other character, did not preclude the executors from being personally liable as between them and the other contributories.

THESE cases were brought before the Lords Justices by appeal from two orders of Vice-Chancellor *Kindersley* made in the winding up of the *Leeds Banking Company*.

The company was established under the provisions of the 7 Geo. 4, c. 46, by a deed of settlement dated the 19th November, 1832. The capital was to be £100,000, in 10,000 shares of £100 each, of which about 8000 were allotted, and the residue reserved.

At a meeting of the directors of the company, held on the 26th of May, 1864, it was resolved to issue the reserved shares—one share to every holder of five shares and upwards; and at a meeting on the 16th of June, 1864, it was resolved that a circular should be sent to all the shareholders offering these shares at £30 each, being a premium of £15 per share.

In pursuance of these resolutions the following circular was addressed to the shareholders on the 22nd of June, 1864.

"SIR,—The directors of the *Leeds Banking Company* being of opinion that it is desirable to issue the reserved shares, have directed me to offer you one share for each five shares held by you, at the sum of £30 per share. As you hold shares, you are entitled to of the new shares. I shall be obliged if you will, within fourteen days from this date, sign and return

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me the annexed form, stating whether you are desirous of taking up the shares, and also whether, in the event of any shares remaining, you wish to have any more allotted to you. If so, please say how many. If taken up, the amount must be paid to the bank on or before the 1st of October next (if paid before that time interest at £5 per cent. will be allowed), and the shares will then be entitled to one quarter's dividend at the end of the year."

Appended to the above was the following form :—

"In reply to your circular of the 22nd instant, I agree to take shares, being my proportion of allotment, and shares in addition, if I can have them on the terms stated in your circular."

The facts in *Fearnside* and *Dean's* case were as follows :—

Edward Fearnside at the time of his death was the owner of ten shares in the company, and by his will dated the 18th of March, 1845, he gave all money and securities for money, bank shares, and other personal estate and effects, to his wife, *Sarah Fearnside*, and to *John Dean* and *John Longfield*, their heirs, executors, administrators and assigns, upon the trusts therein mentioned; there was no clause in the will authorizing the executors to invest in shares.

The testator died on the 6th of August, 1861, and his will was proved by *Sarah Fearnside* and *John Dean*, the two surviving executors.

Soon after the will was proved, the probate was taken to the *Leeds Bank*, and the names of the executors were entered in the shareholders' ledger as being the executors of *Edward Fearnside*.

Ever since the death of *Edward Fearnside* all circulars and notices sent from the bank had been addressed to the executors, who had received all the dividends on the shares, and the receipts for dividends had always been signed by them or one of them as executors of *Edward Fearnside*.

In June, 1864, the printed circular of the 22nd of that month, was sent, addressed to the executors of *Edward Fearnside*, and the form appended to it was filled up and signed by *Sarah Fearnside* and *John Dean*, "executors of the late *Edward Fearnside*," and was in these words :—

"In reply to your circular of the 22nd of June, I agree to take two shares, being my proportion of allotment."

No additional shares were asked for.

Shortly afterwards *Sarah Fearnside* paid into the bank £60 for the two shares so allotted, and a receipt was given to her as executor of *Edward Fearnside.*

On the 19th of September, 1864, the bank suspended payment, and on the 13th of October an order for winding up was obtained.

Sarah Fearnside and *John Dean* were placed on the list of contributories as executors of *Edward Fearnside* in respect of the ten shares which he held at the time of his death, and the official liquidator also sought to have them put on the list in their own right in respect of the two additional shares.

The special circumstances in *Dobson's* case were as follows:—

Mr. *Joseph Dobson,* who was at the time of his death the holder of five shares in the bank, died in March, 1846, having made a will dated the 8th of January, 1846, by which he appointed his sons, *Samuel Dobson, Richard Dobson, James Dobson,* and *John Thackrah,* joint trustees and executors. The bank shares were not mentioned in the will, nor alluded to in any way.

Three of the executors proved the will, and two of them, *Richard Dobson* and *John Thackrah,* were still living.

All the dividends declared on the testator's five shares subsequently to his death were received by *Richard Dobson* or *John Thackrah* as his executors. They were treated throughout as holding the shares in their representative capacity, and in that capacity they were placed on the list of contributories in respect of the five shares held by their testator at his death.

The will of the testator contained no clause authorizing the investment of his estate in shares of any company.

The printed circular of the 22nd of June, 1864, was addressed to the executors of *Joseph Dobson,* and was sent to *Richard Dobson.*

On the 24th of June *Richard Dobson* signed and left at the bank the form appended to the circular, agreeing to take one more share, being his proportion of allotment, and twenty shares in addition if he could have them on the terms stated in the circular,

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and he signed it as executor of *Joseph Dobson*. At the same time *Richard Dobson* paid at the bank £30 for the one share so allotted, and the following receipt was given to him :—

"Paid to the *Leeds Banking Company* £30 on account of *Richard Dobson* for one share allotted, the certificate to be given on the 1st of October, 1864."

Subsequently *Richard Dobson* received another circular dated the 18th of July, in which he was informed that the directors had allotted to him one additional share at the sum of £30 in addition to the one share previously accepted by him, making his number of new shares two, and a clause of forfeiture was added in case of non-payment by the 1st of October.

This circular having been mislaid by *Richard Dobson*, it could not be ascertained how it was addressed, whether to *Richard Dobson* only, or to him as executor of *Joseph Dobson*.

On the 26th of July *Richard Dobson* paid at the bank a further sum of £30 for the share mentioned in the above circular, and a receipt was given to him "on account of executors of *Joseph Dobson*."

J. Thackrah, the other executor, took no part in the application for the additional shares, or in payment of the money.

The official liquidator contended that the two executors ought to be put on the list in their own right for the additional shares.

The Vice-Chancellor was of opinion that in *Fearnside's Case* the two executors ought to be put on the list as executors, but not in their own right. In *Dobson's Case* his Honour held that *Richard Dobson* had taken the additional shares as executor, and was not personally liable, and that as the other executor had not joined in the application, the estate of the testator was not liable, and the names of the executors must be struck out altogether (1).

(1) His Honour's judgment was as follows :—

DOBSON'S CASE.

This case is far more difficult than *Addinell's Case* (Law Rep. 1 Eq. 225). It is, in fact, a new and peculiar case, and I cannot say that I am free from doubt about it. However, I have arrived at a conclusion which satisfies my own mind. Many of the facts are the same as in *Addinell's Case*. *Joseph Dobson* died in March, 1846, at which time he was the holder of five shares

(1) Reported 11 Jur. N.S. 965
(2) Sc. 11 Jur. N.S. 965.

From these decisions the official liquidator appealed. The two cases were argued together.

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in this bank. By his will he appointed four executors; but at the time of the transaction in question, there were, in fact, only two—one having died, and one other not having proved the will. The will contained no special bequest of these shares, nor any mention of them at all; and there was no power given to the executors to invest any of the assets in shares of a public company. From the time of the death of *Samuel Dobson*, the third executor, the dividends on the shares which had been held by the testator were always received by *Richard Dobson*, one of the surviving executors, who was the son of the testator, with one single exception, when the dividend was received by *John Thackrah*. The receipts by *Richard Dobson* were always signed by him as executor of *Joseph Dobson*; and the single receipt by *Thackrah* was signed—"For self and co-executor, *R. Dobson*." Now, these shares having been held by *Joseph Dobson* at his death in 1846, by the terms of the deed of settlement, the directors of the company had a right to require the executors to become qualified shareholders (as it is called), that is, not to continue the holders of the shares in the character of executors, but so that the company might look to them as personally liable in respect of them; or, otherwise, that they should sell the shares. That was the right of the directors; but they did not think fit to exercise it; for during nearly twenty years they allowed the matter to remain in *statu quo*, having no one upon the list of shareholders as the owner of the shares, so as to be under any personal liability in respect of them; but they allowed the shares to stand in that sort of uncertain state, as being shares belonging to two persons as executors; and they continued to pay them the dividends, which by the terms of the deed of settlement they might have refused to do.

I need not again go through the resolutions of the company, nor need I refer again to the terms of the circular of the 22nd of June. That circular was not only sent to every person having shares in his own right, but also to executors. In the present case it was *addressed* to the executors of *J. Dobson*, though it was sent to *Richard Dobson* alone. On receipt of this circular *Richard Dobson* called at the bank, and delivered the printed form appended to it, signed by himself as executor of *J. Dobson*, and filled up in this way:—"I agree to take one share, being my proportion of allotment, and twenty shares in addition, if I can have them." The fact of the pronouns "I" and "my" being in the singular number, is accounted for by the circumstance that those words are part of the printed form. He signed himself "*Richard Dobson*, executor of *J. Dobson*." The addition of the words "Executor of *J. Dobson*" was in accordance with the intention of the parties. The directors did not intend to offer any shares to strangers; and it would have been a violation of their duty in carrying out the resolution, if they had allowed *Richard Dobson* to take a new share in his own right. The intention was, that those who held original shares should have the benefit of the new shares. It is somewhat singular, that the matter does not appear to have ever come to the knowledge of *Thackrah*, the other executor; and he gave no authority to *Richard Dobson* to accept shares on behalf of the executors.

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The clauses of the deed of settlement principally relied on in argument were the following :—

The case, therefore, stands thus: that *Richard Dobson* alone received the letter, and alone—without any communication with *Thackrah*—thought fit to return the answer, signing "*Richard Dobson*, executor of *J. Dobson*." In reply, a similar circular to that which was forwarded to *Addinell* was sent to *Richard Dobson;* but owing to that circular having been lost, we cannot ascertain how it was addressed. If it were necessary for a jury to determine, I think they would come to the conclusion that it was addressed to *R. Dobson*, as executor; and I must assume that he was treated as executor. Some stress has been laid on the terms of that circular—"The directors have allotted to *you* one share in addition to the one share previously accepted by *you*." But those words are part of the printed form; and the share previously allotted to him was allotted to him as executor. When *Richard Dobson* called at the bank with his first answer, he paid the sum of £30 for the share which had first been allotted, and which he had accepted; and when he paid that sum, he received a paper in the nature of a receipt, which had at the foot of it—"Paid to the *Leeds Banking Company*, thirty pounds, on account of *Richard Dobson*, for one share allotted." And when the additional share was allotted to him, he paid a further sum of £30, and received a similar receipt; but the £30 was expressed to have been paid "on account of executors of *Joseph Dobson*." It appears to me that, throughout, the matter is quite consistent. The directors acted consistently with their duties, and with the resolutions, and with the objects in view, namely, that inasmuch as the five shares were held by the executors of *Joseph Dobson*, without having been called upon to become qualified shareholders, the allotments of the two new shares were intended to be made to them in their character of executors.

The same observation applies in this case as in *Addinell's* and in *Barrett's Case*, that in the allotment of the extra share, a new term was introduced respecting forfeiture; but in this case, as in *Barrett's*, the allotment with that new term was accepted by payment of the money; therefore, there was a contract, not only with respect to the one share first allotted, but also with respect to the additional share.

Then comes the question: Is *Richard Dobson* liable to be put on the list, personally and individually, in his own right? Now, I think it is clear that neither *Dobson* nor the directors had any idea or intention, when this correspondence was passing, that *Richard Dobson* was to have these shares in his own right. All the *res gestæ* are inconsistent with that supposition; and particularly, it would have been inconsistent with the duty of the directors to have allowed it; and I think it would have been a violation of the 7th clause of the deed of settlement, which expressly prescribes that no person shall in his own right be allowed to hold less than five shares at any one time. It has been contended, indeed, that the latter part of that clause contradicts that, for it contemplated the case of a person holding less than five shares. But I think the two parts of the clause may be reconciled thus: the former part of the clause was intended to prohibit the directors from permitting a man, by an act of his own, to acquire for the first time a less number of shares than five; the second part of the clause

Clause 7. That no person shall in his own right, nor shall any firm as such (except this company), be allowed to hold, or be bene-

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may have been intended to provide for this sort of case: suppose a man held more than five shares, and sold all but two or three, in that way he might still retain less than five; but he would not be entitled to any dividend thereon until he should have acquired so many more as would make up the full number of five or more.

But then it is contended that *Richard Dobson* stands in the position of a person representing himself to be the agent of another, and entering into a contract as such agent, having no authority to act as agent; in which case, it is insisted, he would render himself personally liable to perform the contract. Whether he would or would not be so liable, I do not stop to consider: for I cannot regard Mr. *Dobson* as representing himself to be an agent at all. His signing the letter as executor does not in any way represent that he was acting as agent for any other person or persons. Nor is there any reason for supposing that the directors regarded him as acting on that footing. Probably it never occurred to them to inquire or consider whether there was any other executor than *Richard Dobson;* and although the will had been left with the company soon after the testator's death (some eighteen years previously) for the purpose of entering the names of the executors, I cannot attribute to them a knowledge of the contents of the will, except so far as that they, at that time, took note of the fact that there were more executors than one. It comes to this, that the directors and *Richard Dobson*, both acting with perfect *bona fides*, took the chance that the transaction was all regular, and that it would be carried out, and *Dobson* took the chance that the other executor, and the parties beneficially interested, would concur in what he had done. And probably these things would have happened had not the failure of the bank disconcerted the intentions of both parties.

I am of opinion that I cannot hold that *Dobson* has made himself personally liable.

Then as to the question whether he should be put on the list in his character of executor—I cannot put *Dobson* alone on the list as executor, because that would have no effect. There being more than one executor, I must put both on the list in that character or neither: for neither is, without the other, the legal personal representative of Mr. *Dobson*. And then, so far as *Thackrah* is concerned, I do not see how I can put him on the list, because so far as appears he has had nothing to do with the transaction, and has not concurred in subjecting the personal estate of his testator to any liability.

The result is, that I cannot put *Dobson* alone on the list either in his individual or in his representative character, nor can I put him on the list jointly with *Thackrah*, because I cannot put *Thackrah* on.

FEARNSIDE AND DEAN'S CASE.

This is, in some respects, very much like *Dobson's Case*. The resolutions and circulars are the same. *Edward Fearnside*, the testator, was the owner, in 1861, of ten shares, and by his will appointed his wife, *Sarah Fearnside*, and *John Dean*, and another person his executors. *Sarah Fearnside* and *John Dean* proved the will, and were the only acting executors. In the will there appears to be so far a reference to the property in question, that in the general bequest of personal estate the testator includes

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ficially interested in more than one hundred shares, nor less than five shares, at any one time, in the capital stock of the company; and that no person or firm (except as aforesaid) holding any shares in this company, above or below the respective numbers above mentioned, at the time of the declaration of any dividend of profits, shall be entitled to claim or receive the dividends payable upon or in respect of the shares hereby prohibited from being held as aforesaid, but the dividends calculated upon such prohibited shares shall be added to the capital of the company, and form part thereof.

Clause 14. That the husband of any female proprietor, or the executor, legatee, or administrator of any deceased proprietor, or the guardian or trustee of any proprietor, or the assignee of any bankrupt or insolvent proprietor, shall not, as such, be a qualified proprietor, in respect of such shares as shall be vested in him, in any of the aforesaid capacities; but any such husband, executor, legatee, administrator, guardian, or trustee, shall be at liberty either to sell and dispose of such shares, in manner and subject to the provisions contained in these presents, or to become a proprietor

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"bank shares," but that has not the least effect on the present question. As in *Dobson's Case*, there is no authority to invest in the purchase of shares. Ever since the death of the testator in 1861, the company have allowed matters to remain in *statu quo*. They have never called upon the executors to qualify, and the executors have been allowed to receive the dividends; and they signed receipts as executors of *Edward Fearnside*.

In this case, as in *Dobson's Case*, there was an entry in the books of the company that the shares were in the hands of *Fearnside's* executors; therefore in this respect, with the single difference of the length of time since the death of the testator, it is the same as *Dobson's Case*. The circular of the 22nd June, 1864, was addressed to the executors of *E. Fearnside*; and the answer accepting two shares, being one for every five original shares, but not asking for any additional shares, was signed by both executors. The £60 for the two shares was subsequently paid into the bank, and a receipt was given with a memorandum that the money was paid "on account of Mrs. *Sarah Fearnside*, executor of *Edward Fearnside*."

All the reasons which I referred to in *Dobson's Case* for holding that he could not be put upon the list of contributories in his own right, apply still more strongly to the present case, and I do not think it necessary to repeat them. I cannot put *Sarah Fearnside* and *John Dean* on the list in their own right.

On the other hand, I have not in this case the difficulty which occurred in *Dobson's Case*, to prevent my putting these two persons on the list in the character of executors. I am of opinion that they must be put upon the list as executors.

in the company in respect of such shares, on giving notice in writing to the directors for the time being of his desire to become a proprietor, whereupon and upon otherwise complying with the provisions contained in these presents, he shall be admitted and become a proprietor of such shares, and shall have the same transferred into his name accordingly. But any such husband, executor, legatee, administrator, guardian, or trustee, who shall not elect to become a proprietor as aforesaid, and also the assignee of every bankrupt or insolvent proprietor, shall sell and dispose of the shares vested in him in any such capacity, and shall be entitled to receive any dividends which shall have become due on such shares before his title to the same shares accrued; but no dividends which may become due on the same shares after his title shall have accrued shall be received or demandable by him.

Clause 18. That every present and future subscriber of shares, and every purchaser, transferree, and representative becoming a proprietor of shares, shall in respect thereof execute these presents, and every supplementary deed or deeds of accession thereto to be approved of by the directors for the time being, and that the number of the shares subscribed for, or purchased, or held by each shareholder shall, at the time of executing these presents or such supplementary deed or deeds of settlement, be marked or written opposite to his name as subscribed thereto; and that in case any of the present or future subscribers, or any purchaser, transferree, or representative becoming a proprietor, shall neglect or refuse to execute these presents, or any such supplementary deed or deeds of accession thereto, for the space of three calendar months next after notice in writing shall have been given or sent to him for that purpose by the directors for the time being, or by such person as they shall appoint in that behalf, it shall be lawful for the directors for the time being at any time thereafter to declare the shares of such person so neglecting or refusing, and all benefit and advantage thereof or incident thereto, forfeited to the other members of the company, and the same shall be forfeited accordingly; and the person so neglecting or refusing shall be excluded all benefit and advantage therefrom; and the directors may thereupon retain or sell the same for the benefit of the company, unless such directors shall in their discretion think fit to waive such

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forfeiture according to the provision for the remission of forfeitures hereinafter contained.

Mr. *Glasse*, Q.C., and Mr. *Cotton*, for the official liquidator:—

In neither of these cases had the executors power to invest the testator's money in bank shares. The Court will not presume them to have been guilty of a breach of trust. It is true that the offer of the shares was made to them as executors; but their act in accepting them was on their own responsibility. They became primarily liable to the company, and if their act was a proper application of their testator's assets, they would be indemnified out of his estate. These observations apply more strongly to *Dobson's Case*, because there *Richard Dobson* acted without the concurrence of his co-executor: *Barrett's Case* (1); *Blakeley's Executors' Case* (2); *Liverpool Borough Bank* v. *Walker* (3); *Hoare's Case* (4); *Hitchcock's Case* (5); *Spence's Case* (6); *Drummond's Case* (7).

Mr. *Baily*, Q.C., and Mr. *Wickens*, for the executors of *E. Fearnside* and *J. Dobson*:—

The shares were offered to the executors in their representative character. The directors had no power to offer them in any other character. Under Clause 7, no person could become a shareholder for less than five shares. The new shares, therefore, must have been allotted in the same right as the old. It was the duty of the directors, if they wished the executors to become personally liable, to call upon them under Clauses 14 and 18 to come in and execute the deed. Until that was done, they were not shareholders in the company: *Bunn's Case* (8).

Mr. *Glasse*, in reply.

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Jan. 17. SIR G. J. TURNER, L.J., after referring to the facts as stated above, and observing on the satisfactory manner in which

(1) 2 Dr. & S. 415; s. c. on appeal, 13 W. R. 826.
(2) 3 Mac. & G. 726.
(3) 4 De G. & J. 24.
(4) 2 J. & H. 229.
(5) 3 D. G. & Sm. 92.
(6) 17 Beav. 203.
(7) 2 Giff. 189.
(8) 2 D. F. & J. 275.

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all the material facts had been brought before the Court upon the admissions of the parties, without obliging the Court to collect them from a mass of affidavits, continued:—

These cases are, as the Vice-Chancellor has justly observed, very peculiar in their circumstances; but I think they may well be decided upon principle. It will be convenient, first, to deal with the case of *Sarah Fearnside* and *John Dean*.

With all possible respect to the Vice-Chancellor, from whose judgment we have but rarely occasion to differ, I have been unable to satisfy myself that the order putting these persons upon the list as executors can be correct. The consequence of these persons being so put upon the list must, as it seems to me, be to render the estate of their testator liable in respect of these shares. So long as they stand upon the list as executors, it would not, as I apprehend, be competent to them to dispute the liability of their testator's estate in any proceedings which the official liquidator might institute against them; but so far as any thing is clear in this case, it is, in my opinion, quite clear that the estate of the testator is in no way liable in respect of these shares. It is not, I think, any answer to this view of the case that these persons may be bound to indemnify the testator's estate, for it may not be in their power to do so, and the question whether this order is right or not cannot depend upon their capacity in this respect. If, therefore, these persons ought not to be put upon the list in their individual character, they ought not, as it seems to me, to be put upon the list at all.

Ought they then to be put upon the list in their individual character? In my opinion—again speaking with all deference and respect to the Vice-Chancellor—they ought. The character in which persons ought to stand upon the list of contributories depended, as I think, until the passing of the late Act, upon the relation in which they stood to the other contributories; and though the late Act may have extended, it does not seem to me to have otherwise altered, the principle upon which the list is to be made up. In what relation, then, did these persons stand to the other contributories of this company when the order for winding up the company was made? Plainly, as it seems to me, upon the footing of equal liability with those other con-

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tributories. It is true that they acquired the shares as executors, but the question is not in what character they acquired the shares, but upon what terms as between themselves and the other contributories they held them when so acquired; and I cannot go the length of holding that because a man acquires a right to shares in a company, or partnership as executor, he will be entitled to hold them upon any other than the ordinary terms. An executor may carry on trade as executor, but he is not the less personally liable for all the debts which he may contract in the trade; and so I take it to be in the case of executors entering into partnership both as to their liability to creditors, and as to the relation in which they stand towards their partners. To put a case strictly analogous to the present: Three persons enter into partnership; they agree that each shall take one-fourth of the profits, and that the remaining fourth shall not be divided, but may at any future time be taken by any of them as they may afterwards agree; and further, that the partnership shall not be determined by the death of any of them. One of the partners dies. The surviving partners offer the reserved share to his executors, and the executors, without any authority under the will to do so, accept the share. Could it be contended that, as between them and the surviving partners, they would be liable in respect of this share only to the extent of the assets of the deceased partner? I think very clearly not, and so I think it must be in the principal case. I do not mean to say that the liability might not be so restricted by express provisions, or that in this case it might not have been so restricted; but I think that something much more strong than is to be found in this case would be necessary so to restrict it.

It was argued, in support of this order, that these shares were a mere accretion to the original shares, to be held as the original shares were held, and that to make these executors personally liable in respect of them, would be to alter the contract on which the shares were taken; but if, as has seemed to me to be the case, these shares, though acquired by these persons as executors, ought to be taken to have been held by them in their own right, this argument does not affect the case.

It was further argued in support of the order, that these shares

being less in number than five, could not be held by these executors in their own right by reason of the 7th clause of the deed, which provides [his Lordship read the clause]; but this argument, again, points to the right to acquire the shares, and not to the consequences resulting from the acquisition of them.

The 14th and 18th articles of the deed were also relied on to shew that these persons never became members of the company; but there was a complete contract by them to take the shares, as we held in *Barrett's Case* (1); and if it was necessary to decide the questions, the 14th article of the deed seems to me to apply only to shares devolving to executors; and the 18th article, whatever its effect may be as to creating a right to forfeit shares on neglect or refusal to execute the deed, does not, as I think, prevent the acquisition of the shares. Assuming that these executors acquired no title to hold the shares in their own right, or that they were misled in supposing that they could hold them as executors, these are matters which would go no further than to give them a right to set aside the purchase on taking proper proceedings for that purpose; but no such proceedings have been taken, and we can only deal with the case as it stands. I desire, however, not to be understood as intending to give the least encouragement to any such proceedings.

What I have said as to the case of *Fearnside* and *Dean*, applies no less to *Dobson's Case*, and in my opinion, therefore, both these orders ought to be discharged, and both these parties must be put upon the list in their individual character; but having regard to the opinion of the Vice-Chancellor, and to this being a case selected for the purpose of settling a general principle, I think we may properly allow the costs of all parties of these appeals to be paid out of the estate.

SIR J. L. KNIGHT BRUCE, L.J.:—I agree.

Solicitors for the official liquidator: Messrs. *Freshfield & Newman.*

Solicitors for the contributories: Messrs. *Torr & Co.*

(1) 13 W. R. 826.

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Nov. 23, 24, 25.
Dec. 5, 22.

DURELL *v.* PRITCHARD.

Mandatory Injunction—Injury completed before Bill filed—Damages—21 & 22 Vict. c. 27—25 & 26 Vict. c. 42.

There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill; and there is no difference in this respect between injury to easements and to other rights. But the Court will only grant such an injunction to prevent extreme or very serious damage.

Under Sir *H. Cairns*'s Act (21 & 22 Vict. c. 27) it is discretionary with the Court whether it will award damages or leave the Plaintiff to obtain them at law.

Under Mr. *Rolt's* Act (25 & 26 Vict. c. 42), where a plaintiff has at the time of filing his bill no ground for equitable relief, the suit is improperly brought into equity, within the meaning of the Act, and the Court will leave the question of damages to a court of law.

THE Plaintiffs in this case were the owners, as devisees in trust under the will of *John Stables*, of two houses, Nos. 32 and 33, on the west side of *Rathbone Place, Oxford Street*. The back premises of these houses, which were used as workshops, looked upon a *Mews* called *Glanville Mews*, running from north to south between *Rathbone Place* and *Newman Street*. The Plaintiffs were also the owners of the premises at the southern extremity of the *Mews*. The buildings forming the west side of *Glanville Mews*, opposite to the backs of Nos. 32 and 33, *Rathbone Place*, and also the ground and soil of the *Mews* itself, subject to a right of way for the Plaintiffs through the *Mews*, belonged to the Defendant, *Henry Pritchard*, and the buildings were used by him as livery stables.

The whole of these premises formerly belonged to *Deborah Robson* and *John Stables*, as tenants in common in fee, but by a deed of partition dated the 24th February, 1853, the part now the property of the Plaintiffs, was conveyed in severalty to *John Stables;* and the part now the property of the Defendant, was conveyed to *Deborah Dobson*, subject to a right of way for *John Stables*, his heirs and assigns, with and without horses, carts, and carriages, through and along the *Mews*.

At the date of the partition deed, and for some years before,

the surface of the *Mews*, which was about twenty feet in width, was partially covered by a lean-to or shed projecting from the stables about half-way across the *Mews*, opposite to the back of the houses in *Rathbone Place*, and supported by wooden posts. The roof of this shed sloped downwards from the stables, and was of the height of about 18 feet at the back nearest the stables, and about 13 feet 6 inches at the front, or lowest part. The shed did not extend along the whole length of the *Mews*, but between its southern end and the southern extremity of the *Mews* was an open space, part of which was occupied by a dung-pit, about ten feet square.

In July, 1863, the Defendant commenced building on the premises belonging to him, and on the site of the shed, and on the ground a foot or two in advance of it, he erected a new brick building of greater height and length than the old shed. The height of the front of the new building, facing the back of Plaintiffs' houses, was about 20 feet, and the height of the middle of the roof about 25 feet, and it extended southwards so as to cover over the space formerly left open. The new building was begun on the 18th July, 1863, but no complaint was made of it until the 5th September, when Mr. *Loaden*, the solicitor of the Plaintiffs, wrote to the Defendant, complaining of the new building as obstructing the light coming to the rear of the houses, No. 32 and 33, *Rathbone Place*, and requesting that the building might be stopped. At that time the walls had been carried to their full height, but the building was not completed.

Some further applications to the same effect were afterwards made by Mr. *Loaden*, but nothing was done upon them; and on the 11th October, 1863, Mr. *Loaden* died.

On the 30th October, Messrs. *Parker*, the Plaintiffs' solicitors, who had succeeded Mr. *Loaden*, called on the Defendant's solicitor and renewed the complaints on the subject of the building, and a further correspondence took place, which continued till the end of November, but without inducing the Defendant to desist from his building, which was completed before the 26th of that month. The Plaintiffs accordingly filed their bill on the 8th January, 1864.

The complaint of the Plaintiffs was not confined to the loss by the tenants of light and air, but they also alleged that the Plain-

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tiffs' right of way along the *Mews* had been injured by the new building, which prevented carts and waggons from turning round in the *Mews;* and that it had been further obstructed by the Defendant having allowed vans and carriages to stand in the *Mews.* The bill (as amended) prayed that the Defendant might be restrained from permitting the new building to continue or remain in its present state, and that he might be ordered to pull down and remove or alter the same, and to restore the *Mews* and buildings to the state they were in prior to the erection of the new building. It also prayed that the Defendant might be restrained from erecting any building in such a manner as to obstruct or interfere with the right of way of the Plaintiffs, or the free access and circulation of light and air to any of the Plaintiffs' houses; and that the Defendant might be restrained from blocking up or obstructing the right of way by keeping or placing in the *Mews* any flys, horses, or carriages, or by any other means. The bill also prayed that damages might be awarded to the Plaintiffs for the injury and expense they had sustained.

The Defendant by his answer admitted the main facts stated in the bill, but he denied that he had caused any material obstruction either to the free access of air and light or to the Plaintiffs' right of way. Both parties entered into evidence, the effect of which is stated in the judgment of Lord Justice *Turner.*

The Master of the Rolls, before whom the cause was heard, was of opinion that, admitting that the Plaintiffs had proved that they had received material injury from the Defendant's building, they were not entitled to an injunction, by reason of the works having been entirely completed before the bill was filed: and that, as they were entitled to no substantial relief in equity, their claim for damages failed also (1).

From this decree the Plaintiffs appealed.

Mr. *Baggallay,* Q.C., and Mr. *Hardy,* for the Plaintiffs:—

The evidence proves that there is substantial obstruction both to the right of way and to the light and air. Although the building was completed before the bill was filed, we are entitled to a mandatory injunction. It is an established head of equity that

(1) The case is reported 13 W.R. 981.

such injunctions should be granted where the damage to the Plaintiff is substantial and continuing. The distinction drawn by the Master of the Rolls between this case and *Lawrence* v. *Austin* (1), that in the latter case something still remained to be done by the Defendant, rests on no sound principle. *East India Company* v. *Vincent* (2), *Robinson* v. *Lord Byron* (3), *Lane* v. *Newdigate* (4), *Rankin* v. *Huskisson* (5), *Spencer* v. *London and Birmingham Railway Company* (6), *Blakemore* v. *Glamorganshire Canal Navigation* (7), *Earl of Mexborough* v. *Bower* (8), *Ranken* v. *East and West India Docks, &c., Railway Company* (9), *Great North of England, &c., Railway Company* v. *Clarence Railway Company* (10), *Greatrex* v. *Greatrex* (11), *Warden of Dover Harbour* v. *South Eastern Railway Company* (12), *Hervey* v. *Smith* (13), *Gale* v. *Abbott* (14), *Phillips* v. *Treeby* (15).

And, even if through acquiescence or delay the Plaintiffs have lost their right to an injunction, they are entitled to damages under Sir *H. Cairns's* Act, 21 & 22 Vict. c. 27, and Mr. *Rolt's* Act, 25 & 26 Vict. c. 42; *Johnson* v. *Wyatt* (16), *Isenberg* v. *East India House Estate Company* (17). Before the passing of those Acts the Court was reluctant to grant a mandatory injunction, lest it should become the instrument of extortion, but now there is no such danger, as the Court assesses the damages itself. The effect of Mr. *Rolt's* Act is that it renders Sir *H. Cairns's* Act imperative. If the Court has jurisdiction, the Plaintiff may claim damages, even though the Court may not think it a case for an injunction. The clause in Mr. *Rolt's* Act (section 4) permitting the Court to refuse relief if the matter has been improperly brought into equity, refers to cases in which the Court has no jurisdiction, not to those in which the Court may, on the particular merits, think an injunction inexpedient.

(1) 13 W. R. 981.
(2) 2 Atk. 83.
(3) 1 Bro. C. C. 588.
(4) 10 Ves. 192.
(5) 4 Sim. 13.
(6) 8 Sim. 193.
(7) 1 My. & K. 154.
(8) 7 Beav. 127.
(9) 12 Beav. 298.
(10) 1 Coll. 507.
(11) 1 De G. & Sm. 692.
(12) 9 Hare, 489.
(13) 1 K. & J. 389.
(14) 10 W. R. 748; 8 Jur. (N.S.) 987.
(15) 3 Giff. 632.
(16) 12 W. R. 234; 33 L. J. Ch. 394.
(17) 12 W. R. 450; 33 L. J. Ch. 392.

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Mr. *Selwyn*, Q.C., and Mr. *T. Stevens*, for the Defendant:—

We contend that there has been no obstruction to the Plaintiffs' right of way, and that the interference with the light and air is trivial. The Court will not grant an injunction unless the injury is substantial: *Clarke* v. *Clark* (1), *Curriers' Company* v. *Corbett* (2). And see *Jessel* v. *Chaplin* (3) in the Court of Exchequer. A mandatory injunction, as a general rule, is never granted where the act complained of is completed before the filing of the bill: *Deere* v. *Guest* (4), *Hindley* v. *Emery* (5), *Jackson* v. *Duke of Newcastle* (6). In all cases where such an injunction has been granted there has been some other equitable ingredient, as fraud, surprise, contract, or the violation of an Act of Parliament. The cases cited on the other side are instances of this. The delay would in itself be a bar to the Plaintiffs succeeding in this suit.

If the Plaintiffs have no equity for an injunction, the bill cannot be sustained under Sir *H. Cairns's* and Mr. *Rolt's* Acts. Sir *H. Cairns's* Act only enables the Court to give damages in cases where it could in its ordinary jurisdiction grant an injunction; but it does not apply to cases where the Court could not grant an injunction: *Johnson* v. *Wyatt* (7), *Attorney-General* v. *Sheffield Gas Consumers Company* (8).

Mr. *Baggallay*, in reply.

Dec. 22. SIR G. J. TURNER, L.J., after stating the facts of the case, and referring to the pleadings in the cause, continued:—

There is evidence in the cause, both on the part of the Plaintiffs and of the Defendant. The witnesses on the part of the Plaintiffs speak generally to obstruction arising from the Defendant placing vans and carriages in the *Mews*, or allowing them to stand there, and to inconvenience arising from waggons and carts being unable to turn in the *Mews* in consequence of the Defendant's buildings; but it is evident from the testimony of these witnesses

(1) *Ante*, p. 16.
(2) 13 W. R. 1056.
(3) 4 W. R. 610; 2 Jur. (N.S.) 931.
(4) 1 My. & Cr. 516.
(5) Law Rep. 1 Eq. 52.
(6) 12 W. R. 1066; 10 Jur. (N.S.) 688.
(7) 12 W. R. 234; 33 L. J. Ch. 394.
(8) 3 D. M. & G. 304. 17 Jur 677

(2) 8 C 4 De G J & S 704. 11 Jur N S 719
(6) 8 C 8 De G J & S 275.
(7) 8 C 9 Jur N S 1383.

that there has always been difficulty in turning carts and carriages in the *Mews*. Some of the Plaintiffs' witnesses also speak to the diminution of light and air coming to the back of the Plaintiffs' houses; but most of the witnesses speak of this in general terms, that the light and air is considerably, or materially, or seriously, diminished. It is said, however, in the affidavit of one or two of them, that in the winter months there is a loss of an hour's daylight in the afternoon. On the other hand, *R. Wheeler*, one of the witnesses on the part of the Defendant, states:—"I say that there is not now more difficulty or inconvenience of turning round carts and carriages in the said *Mews* than there was before the erection by the Defendant of the said new buildings." And again, "During the progress of the said new buildings, or at any time since, I never heard of any complaint on the part of any of the tenants or occupiers of the houses at the back of *Rathbone Place*, that the erection of the said new buildings would obstruct the light or air at any of the back windows of these houses, or any other complaint of the said new buildings; but on the contrary, some of the tenants of the houses in *Rathbone Place*, abutting on the *Mews*, have expressed themselves as pleased with the alterations of the Defendant's premises, observing that the new erection looked much nicer than the old shed, or to that effect." And another of them, *Louis Boura*, who is the occupier of No. 31, says:—"The wall of the said *Henry Pritchard's* new buildings was raised at the time of the alteration about five or six feet. There is not any material or perceptible diminution of light or air to my back premises arising from the aforesaid alteration."

The Master of the Rolls, upon the hearing of the cause, dismissed the bill with costs, upon the grounds, as appearing in the report, that as to ancient lights—and from another part of the report it is to be collected that his Honour meant as to other easements also—the Court could not entertain the matter, as the damage had been actually completed before the bill was filed; in support of which view his Honour referred to the case of *Deere* v. *Guest*. The Plaintiffs have appealed from this decree. Three points have been insisted on upon their behalf in support of this appeal. First, that notwithstanding the damage was completed before the bill was filed, it was competent to this Court to

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grant the relief by way of injunction prayed for by the bill; secondly, that under the circumstances of the case, that relief ought to have been granted; and, thirdly, that assuming that the relief by way of injunction was properly refused, damages ought to have been awarded to the Plaintiffs.

As to the first of these points, the course of the Court in granting mandatory injunctions, such as are prayed for by this bill, was gone into much at large on the part of the Plaintiffs, and a great number of cases upon the subject were cited. I have looked into these cases with as much attention as I have been able, and I do not find that any distinction has been taken in them as to the granting of such injunctions in cases of easements, and in other cases, and certainly they do not seem to me to warrant any such general rule as the Master of the Rolls has laid down being adopted in all cases. The case of *Deere* v. *Guest*, on which his Honour seems mainly to have relied in support of the rule laid down by him, does not seem to me to support it. It certainly does not in terms lay down any such general rule as his Honour has pronounced, and it does not seem to me to prove anything more than that the facts alleged in that particular case were not considered by the Court to be such as to warrant the granting of the mandatory injunction which was asked by the bill. It would certainly not be consistent with the authorities to lay down any such general rule as applicable to all cases; and I can see no principle which can warrant its being laid down as applicable to cases of easements and not to other cases, for in many cases the damage occasioned by interfering with an easement is as great, if not greater, than would be occasioned by interfering with other rights.

I cannot, therefore, venture to go so far as the Master of the Rolls appears to have gone in this case, or to say that relief by way of injunction ought to have been refused in this case upon the mere ground that the damage had been completed before the bill was filed. The authorities upon this subject lead, I think, to these conclusions—that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld.

Such, then, being the principles by which we ought to be guided in determining this case, I proceed to consider the second question, whether, under the circumstances of this case the relief by way of injunction prayed by this bill ought to have been granted, and I am of opinion that it ought not. There are three matters in respect of which the relief is asked. The obstruction to the right of way occasioned by the extension of the new buildings beyond the limits of the shed; the obstruction to the right of way by carriages being allowed to stand in the roadway; and the impediment to the access of light and air occasioned by the new buildings. As to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, the case is one merely of temporary and occasional inconvenience; and as to the third ground, I think that the diminution of light and air to the Plaintiffs' houses is not such as would warrant us in granting the relief which is asked. I fully agree in the observations of the Lord Chancellor in the late case of *Clarke* v. *Clark* (1), which seem to me to go far towards disposing of this part of the case.

The remaining question is as to the damages. This question depends upon *Mr. Rolt's Act*, 25 & 26 Vict. c. 42; and *Sir H. Cairns's Act*, 21 & 22 Vict. c. 27. As to Mr. *Rolt's* Act, independently of the doubt which I suggested in *Johnson* v. *Wyatt* (2); and which I continue to feel, I am of opinion that there is nothing in that Act which renders it necessary for us to give this relief; for I think that the question of damages is—within the meaning of the Act—a question as to which a Court of common law has concurrent jurisdiction; and I think that the Plaintiffs had not at the time of the filing of this bill any case entitling them to relief in equity, and that the matter therefore has been improperly brought into equity, and ought to have been left to the sole determination of a Court of law. It is obvious, that if we were to entertain the question of damages when the

(1) *Ante*, p. 16. (2) 12 W. R. 234; 33 L. J. Ch. 394.

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case in other respects fails in equity, the consequence would be to put an end to all actions in cases of this nature, and bring all such cases under the jurisdiction of this Court.

Then, as to Sir *H. Cairns's* Act, independently of the question whether it empowers the Court to give damages in cases in which there is no sufficient ground for an injunction, I think it clear that the Act leaves it in the discretion of the Court whether it will award damages or not; and I am of opinion that in this case the question of damages will be much more satisfactorily tried at law than in this Court. In the result, therefore, although I differ from the reasons given by the Master of the Rolls, I agree in the conclusion at which he arrived, and am of opinion that this bill was properly dismissed with costs. The appeal, therefore, must be dismissed; but, under the circumstances, I think there should be no costs beyond the deposit, which must be paid to the Respondent.

SIR J. L. KNIGHT BRUCE, L.J. :—

I assent to each of my learned Brother's conclusions, and for the reasons which he has stated.

Solicitors for the Plaintiffs: Messrs. *Parker, Rook, & Parker.*

Solicitors for the Defendant: Messrs. *Bailey, Shaw, Smith, & Bailey.*

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Nov. 7, 8, 9, 10, 11, 13, 14; *Jan.* 18, 1866.

RHODES v. BATE.

Undue Influence—Confidential Relation.

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases: they are important only where no such confidential relation exists.

Where a confidential relation is established the Court will presume its continuance, unless there is distinct evidence of its determination.

The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*.

THIS was an appeal from a decree of Vice-Chancellor *Stuart.* The Plaintiff was a maiden lady, and was, at the time of the commencement of the following transactions, of about fifty years

of age. The principal Defendant, *Robert Bate*, was a certificated conveyancer practising at *Bridgwater*.

In 1847 the Plaintiff went to reside with her brother-in-law, the Rev. *Henry Codrington*, also a Defendant, who was a curate of small income, and possessed of no capital. He had a large family of children, to whom the Plaintiff was much attached. She was at that time entitled, under her father's will, to one seventh share of his residuary personal estate, and soon after she went to reside with *Codrington* she lent him £2000, part of this fund, to enable him to complete the purchase of a piece of land near his house. The remainder of the fund, amounting to £3880, was invested on mortgage in her name. *Codrington* afterwards bought several other pieces of land as a speculation, and in the course of these transactions he became acquainted with the Defendant *Bate*, whom he employed in several of his purchases, and from whom he occasionally borrowed money for the purpose of completing them. On the 8th November, 1854, there was due from *Codrington* to the Defendant *Bate*, on the accounts between them, £221 10*s*., and on that day *Codrington* and the Plaintiff went together to *Bate's* office, and there executed a joint and several bond for securing to *Bate* the sum of £321 10*s*., with interest at five per cent., the Plaintiff joining in the bond as surety for *Codrington*. The sum of £321 10*s*. was inserted in the bond by mistake for £221 10*s*., and on the mistake being discovered in the year 1857, it was corrected by an indorsement on the bond, signed by *Bate*.

In 1853, or, as the Defendant *Bate* alleged, in 1855, *Bate* was consulted by the Plaintiff about preparing her will, and in July, 1855, he made a will for her, in which he was appointed one of her trustees.

In March, 1854, the Plaintiff, under *Codrington's* advice, refused to execute a release to her father's trustees until an investigation of the accounts had been made, and she requested *Bate* to undertake the investigation for her. He declined to do this, and recommended his London agent, Mr. *Stephens*, who undertook the task; but throughout the investigation *Bate* actively interfered in the Plaintiff's behalf, and became acquainted with the particulars of her fortune. The investigation was concluded in 1857, and in

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July of that year the release to the trustees was executed by the Plaintiff, and was attested by *Bate* and his clerk.

On the 15th October, 1857, there was due to *Bate*, on his account with *Codrington*, the further sum of £2089 3*s.* 4*d.*, and on that day the Plaintiff and *Codrington* went together to the office of *Bate*, and there accepted a bill of exchange drawn upon them by *Bate*, for the sum of £1259 17*s.* 8*d.*, and signed a promissory note in his favour for £800, the Plaintiff joining in the acceptance and the note as surety for *Codrington*. At the same interview, the Plaintiff deposited with *Bate* a deed of mortgage for securing to her the sum of £3880, on which her remaining fortune was invested, by way of collateral security for those debts, and signed an agreement to that effect.

On the 24th April, 1860, the further sum of £1488 had become due from *Codrington* to *Bate* on the account between them. This sum was in part made up of a sum of £973 3*s.* 1*d.* paid to Messrs. *Sealy*, bankers, at *Bridgwater*, and of a sum of £317, which the Defendant had paid to the *West of England and South Wales Bank*, in discharge of a joint and several promissory note given to that bank by *Codrington* and the Plaintiff in October, 1857.

On the above-mentioned day (the 24th April, 1860) the Plaintiff and *Codrington* went again to the office of *Bate*, and signed a promissory note in his favour for £1488, the Plaintiff joining as security for *Codrington*. The Plaintiff also, at the same time, signed an agreement charging her mortgage of £3880 with the payment of this further sum.

In this manner the total amount of principal secured on the Plaintiff's property, but which was really due from *Codrington*, amounted to £3769 7*s.* 8*d.*, being, within a small sum, the whole of her property.

In June, 1861, *Codrington* and *Bate* having quarrelled, *Bate* demanded payment of the sums due to him, and the Plaintiff and *Codrington* employed the Defendant, *William Brice*, a solicitor at *Bridgwater*, who ultimately arranged for a transfer of the securities in the hands of *Bate* to the Defendant, *Francis Brice*. This was effected, and the necessary deeds executed on the 11th January, 1862, when *Francis Brice* paid off the sum of £3880 due on the original mortgage, of which sum £3856 12*s.* 2*d.* was paid to *Bate*

on account of the debts and interest due to him from *Codrington*, and the remaining £23 7*s.* 10*d.* to the Plaintiff.

The Plaintiff ceased to reside with *Codrington* in May, 1863, and filed the bill in the present suit on the 10th July, 1863, against *Bate*, *Codrington*, and *William* and *Francis Brice*, alleging that the securities had been obtained from the Plaintiff by the undue influence and control of *Codrington* and *Bate*, and that the Plaintiff was not sufficiently informed of the nature of the documents which she was induced to sign. The bill prayed that *Bate* might repay to the Plaintiff the sum of £3856 12*s.* 2*d.*, and that he and the other Defendants might pay the costs of the suit.

The Defendant *Codrington* did not appear.

The Defendant *Bate* denied the allegations of undue influence, and stated that he had explained the effect of the various deeds to the Plaintiff, and warned her of the results of her executing them: and both parties entered into evidence, the effect of which is stated in the judgment of Lord Justice *Turner*.

The cause was heard by Vice-Chancellor *Stuart*, who granted the relief prayed by the bill: and the Defendant *Bate* appealed from the decision.

Mr. *Rolt*, Q.C., Mr. *Greene*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiff:—

The Defendant *Bate* was the professional adviser of the Plaintiff, and was intimately acquainted with her affairs. She had no independent advice, and did not understand the effect of the transactions. Even if *Bate* exercised no undue influence himself, he knew of the control which *Codrington* exercised over the Plaintiff, and could not take advantage of it for his own benefit: *Nottidge* v. *Prince* (1); *Gresley* v. *Mousley* (2); *Anderson* v. *Elsworth* (3); *Archer* v. *Hudson* (4); *Huguenin* v. *Baseley* (5); *Gibson* v. *Jeyes* (6); *Dent* v. *Bennett* (7); *Maitland* v. *Irving* (8); *Maitland* v. *Backhouse* (9).

(1) 2 Giff. 246.
(2) 1 Giff. 450; s. c. on appeal, 4 De G. & J. 78.
(3) 3 Giff. 154.
(4) 7 Beav. 551.
(5) 14 Ves. 273.
(6) 6 Ves. 266.
(7) 4 My. & Cr. 269.
(8) 15 Sim. 437.
(9) 16 Sim. 58.

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Mr. *Bacon*, Q.C., and Mr. *Freeling*, for the Defendant *Bate*:—

The evidence shews that *Bate* was not the professional adviser of the Plaintiff in any of the transactions complained of, and no confidential relation existed between them. The Plaintiff was not a person of weak intellect, and understood the effect of what she did. She acted throughout with the intention of conferring a benefit on *Codrington* and his family. There is nothing to shew that this suit is not brought in collusion with *Codrington*, who will really reap the advantage if the Plaintiff succeeds.

Blackie v. *Clark* (1); *Hunter* v. *Atkins* (2); *Blagrave* v. *Routh* (3).

Mr. *Rolt*, in reply.

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Jan. 18. SIR G. J. TURNER, L.J., after stating the facts of the case, and referring to the allegations in the bill and the answers, continued:—

Much of the evidence on the part of the Plaintiff is directed to her being of weak mind, a point which, in my opinion, is not in issue in this cause, and which, if in issue, is satisfactorily disproved. I have no doubt whatever that the Plaintiff was perfectly competent to understand what she did. The whole of the evidence on the part of the Plaintiff is so discursive that I find great difficulty in stating the result of it; but I think it may fairly be stated to establish these facts—that throughout the transactions complained of by the bill, the Plaintiff was much under the influence of the Defendant *Codrington*, and that from some time not later than the middle of the year 1855, the Defendant *Bate* took an active part on behalf of the Plaintiff in the examination of the accounts of the trustees under her father's will, and that Mr. *Stephens* acted more in the character of agent for the Defendant *Bate* than of solicitor principally concerned for the Plaintiff in the examination of their accounts; and that the Defendant *Bate* had, before the transactions of the years 1857 and 1860, full knowledge of the amount and value of the Plaintiff's property, and knew that the Defendant

(1) 15 Beav. 595. (2) 3 My & K. 113. (3) 8 D. M. & G. 620.

35. 579.

Henry Codrington had not the means of paying the debts which were due to him (the Defendant *Bate*) and for which the Plaintiff had become security. I think that the evidence on the part of the Defendant *Bate* establishes that the Plaintiff signed the bill of exchange, promissory notes and memoranda, and executed the bonds and deeds in question freely and voluntarily, and without pressure or solicitation on the part of this Defendant; that their contents were fully explained to her, and that she perfectly understood them and their nature, purport, and effect, and the consequences of her signing and executing them.

His Lordship then stated the decree made by the Vice-Chancellor, and continued:—

I have thought it right to enter thus minutely into the facts of the case for three reasons; first, because the case in my view of it is of no little importance in its bearing upon the principles of the Court with reference to cases of persons standing in confidential relations; secondly, because, in my opinion, our judgment must very much depend upon how far the facts of the case warrant the application of those principles; and, thirdly, because the case may well be considered to involve to some extent, at least, a question of character.

With respect to the first of these reasons, I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence. And, as to the nature of the benefit,

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the injury to the party by whom the benefit is conferred cannot depend upon its nature.

This general principle, however, must, as it seems to me, admit of some limitation. It cannot, I think, reasonably be said, that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person ought to stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind. In these cases, therefore, of merely trifling benefits, I think this Court would not interfere to set them aside upon the mere fact of the proof of a confidential relation and the absence of proof of competent and independent advice. In such cases, the Court, before it would undo the benefit conferred, would, I think, require some further proof—proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence.

These are the principles by which, in my opinion, this case must be tried. It was argued, indeed, on the part of the Plaintiff, that there was another general principle of this Court applicable to the case, that a volunteer can take no benefit derived under the fraud of another person. But I think that the Defendant *Bate* cannot be considered to stand in the position of a mere volunteer, and that this principle therefore has no application to the case.

Not much was said in the course of the argument on the part of the Appellant as to the law upon the subject to which I have been referring. The case was distinguished from the authorities on which the Plaintiff relied, but those authorities are merely instances of the application of the general principle. The distinction drawn between this case and the authorities referred to does not, therefore, seem to me to afford any material assistance to the case of the Appellant. The facts of the case were, and, I think, very judiciously, mainly relied upon on the part of the Appellant. I proceed, therefore, to consider how far the facts of the case bring it within the principles which I have stated. It was insisted on the part of the Appellant that he never stood in any confidential relation towards the Plaintiff; or, at all events, that he did not stand in any such

relation at the times when the transactions in question took place. As to his never having stood in a confidential relation to the Plaintiff, it was argued that *Stephens*, and *Stephens* alone, was her professional adviser; but *Stephens* was the general agent of the Appellant; and, without going the length of saying that the Appellant could in no case and under no circumstances have acquitted himself of liability to be considered as a confidential agent, by having placed the Plaintiff in the hands of his agent, the danger of allowing a principal to escape from liability under the pretence that business was entrusted to his agent and not to him is so great, that it may, I think, safely be said that under such circumstances the strongest possible evidence that the agent was intended to act, and, in fact, acted independently of the principal, would be required to acquit the principal of the liability; and, in this case, not only is there no such evidence, but the evidence fully satisfies me that the Appellant so acted and interfered in the examination of the accounts of the trustees of the will of the Plaintiff's father, not only as the principal of *Stephens*, but even independently of *Stephens*, as to constitute a relation of confidence between him and the Plaintiff. I am of opinion, therefore, that the Plaintiff has established that a confidential relation for some time subsisted between her and the Appellant, and it is then to be considered whether this relation subsisted at the times when the transactions in question took place. For this purpose it is necessary to consider each of these transactions separately.

First, then, as to the transaction of the 8th of November, 1854, —the execution of the bond of that date. In proof of the confidential relation having existed at that time, the Plaintiff relies on her having, as she alleges, consulted the Appellant in the year 1853 as to the alteration of her will, but the evidence does not satisfy me that this took place in the year 1853. On the contrary, I think that on the balance of the evidence the better opinion is that it took place in the year 1855. Assuming it, however, to have taken place in the year 1853, I think that this was a single and separate transaction, and not sufficent to constitute such a confidential relation as would extend to or affect a subsequent transaction occurring at a future and somewhat distant time, upwards of a year afterwards. With the exception of this

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alleged consultation as to the will in the year 1853, I can find nothing in the evidence to establish the existence of any confidential relation between the Plaintiff and the Appellant at the date of the transaction which we are now considering; the examination of the accounts not having, so far as I can find from the evidence, commenced at that date. I am of opinion, therefore, that the Plaintiff has failed to establish the existence of any confidential relation between her and the Appellant when this transaction took place. It will be convenient now to dispose of this part of the case. Failing the proof of confidential relation, the Plaintiff has nothing, so far as I can see, on which she can rely, except the influence which the Defendant *Codrington* exercised over her; but there is no proof that the existence of this influence was at this time known to the Defendant *Bate;* and even assuming it to have been so, the transaction was no more than this, that a lady with a fortune of nearly £4000 became surety for her brother-in-law for the sum of £221, and I do not think that this was a transaction against which, standing by itself, and in the absence of proof of undue exercise of influence or of fraud, the Plaintiff could be entitled to relief. With all deference to the Vice-Chancellor, therefore, it seems to me that this decree has been carried too far in having made the Appellant liable for the £221.

Then as to the transactions of the 15th October, 1857, and the 24th April, 1860, it was argued for the Appellant that at the date of these transactions the relation of confidence between him and the Plaintiff had ceased, the examination of the accounts of the trustees of the father's will, having been closed in July, 1857. But I think that where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shewn in order to determine it. The mere fact that the relation is not called into action, is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it. Besides, in this case, the evidence shews that the relation was continuing in the month of July, 1858, when the debt to the *West of England and South Wales Bank* was paid, and the relation between the Appellant and *Codrington*, which had given rise to the relation between the Appellant and the Plaintiff, continued down to the month of December, 1861. In

my opinion, therefore, a confidential relation must be taken to have subsisted between the Appellant and Plaintiff at the time when the transaction I am now considering took place. Then, what was the effect of these transactions? By the first of them the Appellant took to himself the benefit of the Plaintiff's suretyship to the extent of upwards of half her fortune. By the other of them he took to himself the like benefit to the extent of nearly the whole of the Plaintiff's fortune, and this he did with knowledge that the principal debtor could not pay the debt, and that the suretyship must be resorted to for payment of it. It is true that he told the Plaintiff this, and cautioned her as to it, but I do not find that he pressed the subject upon her as an independent and disinterested adviser would have done; or that he recommended her to employ an independent solicitor. Under these circumstances, I think that these transactions cannot stand consistently with the general principles of the Court, and that, subject to the questions to be considered as to the debts due to *Sealy's* and to the *West of England and South Wales Bank*, the Appellant has been properly ordered to pay to the Plaintiff the sums which he received in respect of these transactions.

As to these debts due to *Sealy's* and to the *West of England and South Wales Bank*, they appear to me to stand upon a different footing from the other parts of the case. According to the evidence, as I collect it, these debts were paid by the Appellant at the instance of the Plaintiff no less than of the Defendant *Codrington;* and I apprehend that upon these debts being paid by the Appellant, the Plaintiff, no less than the Defendant *Codrington*, became liable to the Appellant for the amounts paid by him. There are no facts stated on the bill, or appearing by the evidence, which could have enabled the Plaintiff to have resisted the payment of these debts as against *Sealy's*, or as against the *West of England and South Wales Bank;* and there is no ground, therefore, for the suggestion made by the bill, that the Appellant ought to have advised the Plaintiff not to have paid them. It was said for the Plaintiff that the Appellant, by paying these debts, put it out of the power of the Plaintiff to dispute them, but this argument has no foundation, unless there were reasonable grounds for disputing them, and no such grounds

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are alleged. Under these circumstances, I do not see how the Appellant can justly be held to have been liable to the Plaintiff for the amount of these debts; and again, speaking with all respect for the Vice-Chancellor, I think the decree has gone too far in having made him liable for these amounts, and that they ought to be deducted from the sum ordered to be paid by him.

As to the costs of the suit, I think the decree is right so far as it throws upon the Appellant the costs of the Defendants, the *Brices;* they have been made parties at his instance; but I think that the Appellant ought not to have been ordered to pay the Plaintiff's costs of the suit, for in my opinion her case fails to no inconsiderable extent, and so far as she succeeds she does so by force of the law of the Court, and not by any merits of her own. Besides, the evidence which she has adduced is, to say the least of it, to a great extent irrelevant and overcharged.

Before parting with the case, I think it right to add that, although I am not satisfied with some of the statements contained in the answers of the Appellant, there is not in my opinion anything in the case affecting the moral character of the Appellant, so far as the transactions in question are concerned. I think that he meant to give, and did give, the Plaintiff honest advice, and that his liability arises not from his having failed to do so, but from his not having sufficiently attended to the law of this Court, with reference to persons standing in confidential relations. The result is that this decree ought to be varied by deducting from the sum ordered to be paid by the Appellant, the sum of £221, and the sums paid to *Sealy's* and to the *West of England and South Wales Bank*, and any interest which may have been charged upon these sums, and by striking out the direction for the Appellant to pay the Plaintiff's costs, leaving him liable, however, for the costs which the Plaintiff is to pay to the *Brices*.

SIR J. L. KNIGHT BRUCE, L.J.:—

I have throughout thought, and still think, that this is a case of considerable importance with regard to the application of the principles on which the Court ought to act in transactions between persons, one of whom stands in the relation of professional or other confidence to the other; and I acknowledge that

at the conclusion of the argument my impression was altogether against the Plaintiff, and in favour of the proposition that the bill ought to be dismissed. That, however, was not a clear impression, and subsequent consideration and reflection, combined with communication with my learned Brother, have brought me round to his opinion, which I have since adopted and still hold. According to my present view, which is one agreeing with his, I accede to his proposal as to the mode of dealing with this case.

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Solicitors for the Plaintiff: Messrs. *Hardisty & Rhodes.*
Solicitors for the Defendant: Messrs. *Stephen & Smith.*

In re NEWBERY.

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Infant—Religious Education—Plymouth Brethren.

A father, being a beneficed clergyman of the Church of *England*, appointed his widow and a clergyman guardians of his infant children. The widow became a member of the sect of *Plymouth Brethren*. On the application of the other guardian, the Court affirming the decisions of *Stuart*, V. C., ordered the children, who were respectively in their fifteenth and twelfth years, to be brought up as members of the Church of *England*, and restrained their mother from taking them to a chapel of the *Plymouth Brethren*.

In such a case the Court will pay no regard to the fact that the father was well affected towards dissenters, and associated with them: nor will it be influenced by the wishes of the infants upon the subject.

THIS was an appeal from an order made by Vice-Chancellor *Stuart*, on an adjourned summons, with respect to the education of two children of the late Rev. *Thomas Newbery* (1).

The material facts were as follow:—The Rev. *Thomas Newbery*, who was a beneficed clergyman of the Church of *England*, died in 1861, having, by his will, appointed his wife, during her widowhood, and the Rev. *Henry Caddell*, also a clergyman of the Church of *England*, guardians of his infant children.

Mrs. *Newbery*, the widow of the testator, was a professing member of the Church at the time of her husband's death, but shortly afterwards she joined the sect of the *Plymouth Brethren*. The

(1) Law Rep. 1 Eq. 431.

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eldest infant, *W. F. H. Newbery*, was a boy now in his fifteenth year; and the younger, *M. A. V. Newbery*, a girl in her twelfth year. Their mother was in the habit of taking them both to the meetings of the *Plymouth Brethren* for public worship, and wished to bring them up as members of that community. Under these circumstances Mr. *Caddell*, the other guardian, applied for a scheme for the education of the children, and for a declaration that they ought to be brought up as members of the Church of *England*.

Affidavits were filed in opposition to the application, tending to prove that the late Mr. *Newbery* was unsettled in his attachment to the Church of *England*, and associated much with *Plymouth Brethren* and other dissenters; and the elder of the infants also made an affidavit stating his attachment to the views of the *Plymouth Brethren*, and his desire to be brought up in that community.

The substance of the affidavits is fully stated in the report of the case before the Vice-Chancellor.

With respect to the tenets of the *Plymouth Brethren*, or, "The *Brethren*," as they style themselves, the principal evidence was the account of that body given in the report on Religious Worship by the Registrar-General in 1851, in which the following passage occurs (p. 42):—

"All believers are, it is affirmed, true spiritual priests, capacitated for worship, and any who possess the qualifications from the Lord are authorized to evangelize the world or instruct the Church; and such have not alone the liberty, but also an obligation, to employ whatever gift may be entrusted to their keeping. Hence, in their assemblies, Brethren have no pre-appointed person to conduct or share in the proceedings; all is open to the guidance of the Holy Ghost at the time, so that he who believes himself to be so led of the Spirit may address the meeting. The Brethren, therefore, recognise no separate orders of 'clergy' and 'laity'—all are looked upon as equal in position, differing only as to gifts of ruling, teaching, preaching, and the like. The ordinances, consequently, of baptism, when administered, and the Lord's Supper which is celebrated weekly, need no special person to administer or preside."

The Vice-Chancellor made an order declaring that the infants should be brought up in the communion, doctrines, and worship of the Church of *England*, and that they ought to attend the public worship of such church, and ought not to attend the churches or meetings of the *Plymouth Brethren*; and that Mrs. *Newbery* should be restricted from taking the infants to any place of worship where worship was performed otherwise than according to the rites and ceremonies of the Church of *England*. And he directed that the matter should be adjourned to Chambers, to settle a scheme for the education of the infants.

Mrs. *Newbery* appealed from this order.

Mr. *Malins*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

The religious belief of the *Plymouth Brethren* differs but slightly from that of the Church of *England*, although there is great difference in their ideas of Church Government. The father of the infants was himself well affected towards that body. The children, especially the eldest, have now come to an age when they are capable of understanding the difference between the two religious systems, and when it might be injurious to unsettle their religious faith. We ask that the Court would examine them personally on this subject. *Witty* v. *Marshall* (1); *Stourton* v. *Stourton* (2); *Lyons* v. *Blenkin* (3).

Mr. *Bacon*, Q.C., and Mr. *C. Hall*, for Mr. *Caddell*, were not called on.

SIR J. L. KNIGHT BRUCE, L.J.:—

We both think that this order is right. The only traceable form of religion which can be ascribed to the father of the infants was that of the Church of *England*, in which he was a beneficed clergyman until the time of his decease. The form of religion (if religion it can be called) to which it is desired by the mother to ascribe the children, and in which to bring them up, is one which

(1) 1 Y. & C. Ch. 68. (2) 8 D. M. & G. 760.
(3) Jac. 245; see also *Talbot* v. *Earl of Shrewsbury*, 4 My. & Cr. 672, *Austin* v. *Austin*, 13 W. R. 761.

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is without government, without ministers, without any fixed or settled means of ascertaining who belong to the community, and what are the doctrines entertained by them. They appear to be a casual and variable collection of ungoverned professing Christians, congregated together without any settled form of worship. I do not wish to speak disrespectfully, but I must say that this proposal of the mother amounts to nothing more than the bringing up of the children to no religion at all. The sole guide which the Court has is the religion of the father, which was that of the Church of *England*. It has been urged that we ought to see the infants, in order to ascertain their views on religion, but that would be immaterial. If this young man and young lady were to profess themselves in favour of ascribing themselves to a society of this description, I should still feel it my duty to them to prevent it. The order of the Vice-Chancellor is in my opinion perfectly right, and the appeal must be dismissed.

SIR G. J. TURNER, L.J.:—

I entirely agree. The general doctrine of this Court cannot be disputed, that the children should be brought up in the religion of their father. There is nothing in this case which satisfies me that the father was other than a member of the Church of *England*. It was said that he entertained favourable views of dissenters, and associated with dissenting ministers. He might have done so, as many other worthy men have done, but it does not follow that he approved of their tenets. Above all, there is no evidence of any disposition on his part to adopt the tenets of the *Plymouth Brethren*. It was argued that we ought to see these children. Certainly, if I thought it would be of any benefit, I would do so with pleasure; but whatever their wishes might be, I am of opinion that it would be a gross breach of duty on our part if we were to sanction their being received into the community of *Plymouth Brethren*, for I cannot see any one intrusted to teach the doctrines of that community. There are persons, no doubt, who officiate in public worship, but what does the account of the Registrar-General say? "In these assemblies Brethren have no pre-appointed person to conduct or share in the proceedings; all is open to the guidance of the Holy Ghost at the time; so that he who believes

himself to be so led of the Spirit may address the meeting." That is to say, the congregation may be taught by any person who may believe himself to be inspired at the time. But this is not the way in which children should be brought up. Nothing could be more prejudicial to children than to place them in a community where there are no persons of authority to teach them what is their duty, or what they should believe. This case is very similar to the case of *Bligh* v. *Bligh*, the minutes of the order in which case is given in *Seton* on Decrees (1). In that case the Court restrained the mother from taking the infants to the chapel referred to in the Petition, and it is right that a similar order should be made here. And if the children are not to be taken to the chapel of the *Plymouth Brethren*, it follows that they must be taken to the public worship of the Church of *England*. So far, therefore, the order of the Vice-Chancellor is quite correct; and it is quite consistent with this, that they should not be taken to any other place of worship, for it would interfere with the previous part of the order. Therefore, there is no fault to be found with the order of the Vice-Chancellor.

Much has been said about separating the children from their mother. That is not now the question before us. I hope that no question will arise on that point. But it may arise, if this lady does not comply with the order of the Court; for if she directly or indirectly interferes with the order of the Court, or encourages the children to attend the meetings of this community, it may be necessary to remove her from the guardianship. But I hope that nothing will be done to lead to any such result. The appeal must be dismissed, and we think that it ought to be dismissed with costs.

Solicitor for the Appellant: Mr. *Vining*.
Solicitor for the Respondent: Mr. *St. B. Sladen*.

(1) Vol. ii. 3rd ed. p. 714.

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WYCOMBE RAILWAY COMPANY *v.* DONNINGTON HOSPITAL.

Railway Company—Purchase from persons under disability—Lands Clauses Consolidation Act, s. 9—Specific performance—Mistake.

The provisions of the 9th section of the *Lands Clauses Act*, as to the purchase of lands from persons under disability, must be strictly complied with.

Therefore, when a railway company agreed with a charitable corporation, having no power to sell except under the *Lands Clauses Act*, for the purchase of a piece of land, and no certificate had been obtained from two surveyors of the adequacy of the price, the Court, affirming the decision of the Master of the Rolls, refused to decree specific performance of the agreement.

Semble, where one of the parties to a contract proves that he understood the agreement in a different sense to the other, the Court will refuse to decree specific performance of the agreement, without considering whether the Defendant's construction be reasonable or not.

THIS was an appeal from a decree of the Master of the Rolls.

The bill was filed for obtaining specific performance of an agreement for the purchase of a piece of land, the property of the Defendants, under the powers of the *Wycombe Railway (Extension to Oxford and Aylesbury) Act*, 1861, which incorporated the *Lands Clauses Consolidation Act*, 1845.

The Defendants were a corporation founded under a charter of Queen *Elizabeth*, under the name of *The Minister and Poor Men of Donnington Hospital*. They had no power to sell land except under the provisions of the *Lands Clauses Consolidation Act*. At the time of the agreement for sale to the railway company the land in question was held, together with other land, by Mr. *Walsh*, on a lease for forty years from March, 1852, at a rent of £200 per annum.

In August, 1862, the Plaintiffs gave notice under their Act of their intention to take the lands in question, and negotiations accordingly took place between the parties, in which Mr. *R. F. Graham*, the solicitor and steward of the Defendants, acted on their behalf, Messrs. *Baxter, Rose, & Norton* on behalf of the Plaintiffs, and Mr. *Field*, a surveyor, on behalf of *Walsh*. At a meeting between all parties, on the 3rd of December, 1862, it

was agreed that the whole amount of compensation for the fee simple in possession should be £1500. According to Mr. *Field's* valuation, the apportioned rent in respect of the land taken, about seven acres, was £10 8*s*., and on the supposition that the lessee still continued to pay the old rent of £200 to the hospital without abatement, the compensation to him ought to be £870, and to the hospital £630; but if the lessee's rent was abated to the extent of £10 8*s*. his compensation ought to be £619 10*s*., and that of the lessors £880 10*s*.

The parties not being able to agree upon the apportionment, the Plaintiffs obtained the valuation of a surveyor under the 85th section of the *Lands Clauses Act*, who assessed the compensation for the lessors at £900, and of the lessee at £600, which sums they proposed to pay into Court.

However, on the 31st of December, 1862, *Walsh* came to an agreement with the company; and he subsequently, on the 25th of April, 1863, in consideration of £620, assigned the piece of land to them for the residue of the term, subject to the payment to the hospital of the apportioned rent of £10 8*s*.

On the same day, the 31st of December, 1862, *Graham*, having heard that *Walsh* had been settled with, signed an agreement of that date, which had been previously prepared by him, on behalf of the Defendants. By this agreement the Defendants agreed to sell to the company, and the company agreed to purchase, the piece of land at the price of £900. The vendors agreed to make a good title to the premises, as freehold of inheritance, in fee simple in possession free from incumbrances, except the lease to *H. Walsh*. The purchase-money was to be paid into the *London and Westminster Bank* to await the completion of the purchase. The purchase-money was to comprise (subject as aforesaid) compensation for the entire value of the land and for all damages done to the remaining estate of the vendors, occasioned by severance or otherwise in the construction of the railway, which could have been awarded by a jury, in case the value of the land and compensation for damages had been settled by verdict of a jury according to the provisions of the company's Act, or the Acts incorporated with it.

At the meeting of the 3rd of December it had been proposed

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that Mr. *Vernon* should act as surveyor on behalf of the company, and Mr. *Field* on behalf of the hospital, to certify the adequacy of the compensation, under the 9th clause of the *Lands Clauses Consolidation Act*, 1845;* but there had been no formal appointment of Mr. *Field* to act on behalf of the hospital. And in the month of July, 1863, Mr. *Vernon* sent to Mr. *Graham* a valuation and declaration, with a request that he would obtain the signature of Mr. *Field;* but in consequence of the difference which arose between the parties no joint certificate was ever signed.

The company paid the purchase-money into the bank, and took possession of the land, in pursuance of the agreement; but the Defendants refused to execute the conveyance except upon the terms of the company paying them a yearly rent of £10 8s., as the apportioned rent of the land taken. They contended that, upon the true construction of the agreement of the 31st of December, 1862, the company only purchased from them the reversion after the determination of the lease, and that they were entitled to the full reserved rent of £200 from *Walsh* and the company, according to their respective interests.

Mr. *Graham* deposed that this was his understanding at the time when he executed the agreement, and in confirmation of this view he adduced a letter which he had written to Mr. *Field* on the 2nd of January, 1863, two days after the execution of the agree-

(*) This clause is as follows:—The purchase-money or compensation to be paid for any lands to be purchased or taken from any party, under any disability or incapacity and not having power to sell or convey such lands, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party; and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall, upon application of either party after notice to the other party for that purpose, nominate, and each of such two surveyors if they agree, or if not, then the surveyor nominated by the said justices shall annex to the valuation a declaration in writing subscribed by them or him of the correctness thereof, and all such purchase-money or compensation shall be deposited in the bank for the benefit of the parties interested in manner hereinafter mentioned.

ment, which contained the following sentence: "On my reaching Messrs. *Baxter's* office a telegram informed me that Mr. *Walsh* was settled with. I did not ask upon what terms; but being thus unfettered by his interest in the property, I closed with Messrs. *Baxter & Co.* at £900 for the interest of the lessors, and the money has been deposited in the *London and Westminster Bank* in the names of Mr. *Rose* and myself, and they will get the valuation of the lessors' interest assessed by Mr. *Vernon* and yourself adopting the £900. There remains, therefore, nothing more to trouble us as to the apportionment or abatement of rent. Mr. *Walsh* will continue liable to the reserved rent of £200."

The Plaintiffs accordingly filed their bill praying for specific performance of the agreement of the 31st of December, 1862, and that the Defendants might convey the land to them free from incumbrances, including the apportioned rent of £10 8*s*.

The Master of the Rolls considered that the fair construction of the agreement, taken by itself, was, that the sum of £900 was to include compensation for the loss of the apportioned rent of £10 8*s*., but that the agreement had been entered into under a misunderstanding, and he dismissed the bill without costs. From this decree the Plaintiffs appealed.

Mr. *Baggallay*, Q.C., and Mr. *J. Pearson*, for the Plaintiffs:—

The terms of the written contract between the parties are too clear for misunderstanding, nor was there any error in them. The mistake alleged was a misunderstanding by the Defendants of the legal effect of the agreement, and affected the relative position of the hospital and their tenant, not of the hospital and the company. If the Defendants' construction of the agreement is correct, part of the consideration for the sale of the land would have been the payment of a rent-charge to the hospital; and such a contract would have been beyond their powers as a corporation. *The Lands Clauses Consolidation Acts Amendment Act* (1) gives power to parties under disability to sell lands for a rent-charge, but does not authorize them to sell partly for a gross sum and partly for a rent-charge. The provisions of the 9th clause of the *Lands Clauses Act* were substantially complied with, as both parties

(1) 23 & 24 Vict. c. 106, s. 2.

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had agreed upon the valuers, and the valuers were prepared to concur in the valuation.

Mr. *Hobhouse*, Q.C., and Mr. *Swanston*, for the Defendants:—

The Defendants never agreed to accept £900 if the rent was abated. Mr. *Graham*, their agent, understood from the solicitors of the company that all the tenant's claim had been satisfied, and accepted £900 on that assumption. The fact of the mistake is evidenced by Mr. *Graham's* letter of the 2nd of January, 1863: *Alvanley* v. *Kinnaird* (1); *Baxendale* v. *Seale* (2); *Helsham* v. *Langley* (3); *Manser* v. *Back* (4); *Malins* v. *Freeman* (5); *Ball* v. *Storie* (6); *Leslie* v. *Tompson* (7); *Swaisland* v. *Dearsley* (8); *Webster* v. *Cecil* (9).

The provisions of the *Lands Clauses Act* have not been complied with. The hospital did not appoint a surveyor, nor was there any joint certificate. The parties being under disability, the provisions of the Act must be strictly followed: *Baker* v. *Metropolitan Railway Company* (10). Where the price of the property purchased is to be settled by arbitration, the Court will not decree specific performance: *Milnes* v. *Gery* (11); *Darbey* v. *Whitaker* (12).

Mr. *Pearson*, in reply, referred to *Gregory* v. *Mighell* (13).

SIR J. L. KNIGHT BRUCE, L.J.:—

This is an appeal from the dismissal by the Master of the Rolls of a bill, by the purchasers of an estate, for specific performance of the contract to sell; the purchasers being a railway company, and the vendors an ecclesiastical corporation. The purchasers are in possession, but in consequence of a dispute which has arisen, they have not yet paid for the estate, and have not obtained a conveyance, and they have filed this bill for the

(1) 2 Mac. & G. 1.
(2) 19 Beav. 601.
(3) 1 Y. & C. Ch. 175.
(4) 6 Hare, 443.
(5) 2 Keen, 25.
(6) 1 S. & S. 210.
(7) 9 Hare, 268.
(8) 29 Beav. 430.
(9) 30 Beav. 62.
(10) 31 Beav. 504, 511.
(11) 14 Ves. 400.
(12) 4 Drew. 134.
(13) 18 Ves. 328.

purpose of obtaining a conveyance. The dispute has been, and is, substantially, about the price. It does not assume that simple form, but it turns on a contention on the part of the purchasers, that the charity should be subjected to a rent-charge of £10 8s., which would diminish the price paid to the charity to that extent for a small number of years. The purchasers assert that it was so expressed in the contract, and that it was so intended; the vendors assert that the true construction of the agreement is otherwise, and that it will not bear the construction the purchasers contend for; but the vendors also contend that whether that be so or not is immaterial; for that the agent for the vendors throughout understood that the price paid to the charity was not to be reduced by that amount. Evidence has been produced on both sides. Much correspondence passed before, about, and after the agreement; and a letter written contemporaneously with the agreement distinctly declares the sense entertained by the agent of the vendors as to what was to be the position of the charity in this respect, and declares that sense to be that the purchase-money was not to be diminished in the manner suggested. It is sworn by the vendor's agent that this was his sense and understanding. It may appear singular, and may be the subject of observation, but it is sworn to—and this is a case of specific performance. It would be contrary to the rules of this Court to enforce specific performance against a Defendant so swearing, and, in fact, so proving.

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This case, however, has a peculiarity about it. The vendors are not *sui juris*, and a mode has been settled by the Legislature for effecting contracts between railway companies and persons who are not *sui juris*. It has provided that the course is to be by obtaining a valuation by two surveyors. That has not been done; and it is, moreover, a case of doubt and difficulty; and in such a case it would be wrong to treat the rights of a charity as liable to be dealt with on the same footing as the property of a private person. What has been done, therefore, must go for nothing; and the price must be settled in the manner required by the Act of Parliament. The bill must be dismissed. My learned Brother wishes to preface the dismissal with a declaration, to which I have no objection. The bill must be dismissed as contrary to the

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principles and practice of this Court in questions of specific performance, but without costs.

SIR G. J. TURNER, L.J.:—

I agree. The only point on which I intend to express an opinion is, on the *Lands Clauses Consolidation Act*. The 9th clause provides [His Lordship read the clause].

Now, it is not disputed that in this case there has been no regular nomination of surveyors. There may have been some action with respect to surveyors, but there has been no regular nomination to determine whether the price was not less than it ought to have been. But the case does not stop here, for the surveyors are to certify whether they are or not agreed in the valuation. The object of the Act was, that these two surveyors should meet and consider the question. It was not intended that, without meeting and consulting, one should say "I agree," and then the other should say "I agree." It was intended that they should meet and consider whether the price is or not a fair price. Nothing of this has been done. No step has been taken by either party to follow out the provisions of the Act, either in the nomination of surveyors or in obtaining their certificates. The intention of the Act was to protect persons who are incompetent to deal with the company on their own account. This Court cannot overleap these precautions and substitute for them the opinion of two surveyors without reference to the Act.

It seems to me, therefore, that this contract was never a complete and final contract under the Act. The price was never completely fixed. I think that this ought to appear on the face of the order as the ground of the dismissal of the bill. The order will be in this form:—It appearing to this Court that the price to be paid by the company in respect of the purchase in the bill mentioned has not been ascertained and settled in due conformity with the provisions of the *Lands Clauses Consolidation Act*, and that the agreement has not become final and complete, and ought not to be specifically performed, the Court doth order that the bill be dismissed without costs. There will be no costs of the appeal.

Mr. *Baggallay* asked that a declaration might be inserted that

the bill was dismissed without prejudice to any action which the Plaintiffs might be advised to bring with reference to the agreement.

SIR G. J. TURNER, L.J.:—

There will be no objection to that. I am more inclined now to introduce those words than formerly, in consequence of Mr. *Rolt's* Act; because, since the passing of that Act, the Courts of common law have in some cases declined to interfere after a Plaintiff's bill has been dismissed in this Court.

Solicitors for the Plaintiffs: Messrs. *Baxter, Rose, & Norton.*

Solicitors for the Defendants: Messrs. *Chilton, Burton, Yeates, & Hart.*

STEELE *v.* THE MIDLAND RAILWAY COMPANY.

Lands Clauses Act—Sec. 92—Part of a House.

The Plaintiff was owner and occupier of a house and six acres of meadow land on the west of the *Edgware Road.* He had a large family, and the ground he had being insufficient for the horses and cows which he kept for their use, he bought six and a quarter acres on the other side of the road, the nearest point being distant 120 yards from his entrance-gate. At the nearest point of this land were a cow-house, loose box, and a cottage which was occupied by his grooms, because he had no accommodation for them on his own side of the road, and he for a number of years occupied the land for the purpose of feeding the horses and cows requisite for his establishment:—

Held, by *Turner*, L.J., affirming the decision of *Wood*, V.C., *dubitante*, *Knight Bruce*, L.J., that the six and a quarter acres could not be considered part of the house within the meaning of the 92nd section of the *Lands Clauses Consolidation Act.*

Per TURNER, L.J.:—The word "house" in the above section, includes all that would pass by a devise of the house; but that does not include land which is not necessary for the convenient use and occupation of the house, but only for the personal use and convenience of the owner and occupier.

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Wood* refusing an injunction.

The Plaintiff was the owner and occupier of a house at *Cricklewood*, in which he had resided with his family for about twenty-

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two years. This house had attached to it about six acres of meadow land, and the property adjoined the western side of the *Edgware Road.*

Many years before the institution of this suit the Plaintiff, being in want of additional meadow land to keep horses and cows for his establishment, bought the remaining seven years of a rackrent lease of a messuage called *Cricklewood House*, adjoining the eastern side of the *Edgware Road*, and nearly opposite to his house. This messuage had attached to it at the back about eight acres of meadow land. The Plaintiff for some time occupied the whole of the meadow land himself, and was obliged in consequence to let the house remain unlet because he would not let any meadow land with it. Before the expiration of the lease, finding that he probably would not be able to obtain a renewal, he bought the property, which included also another house adjoining *Cricklewood House.* He paid for this property £8200. At the time of the suit these houses, with a portion of the meadow land, were let for rents amounting together to £182, the Plaintiff retaining in his own occupation about six acres and a quarter. This state of things had continued for some years before the institution of this suit.

The Plaintiff had a large family, and kept for their use five horses and a pony and four cows. He deposed that the six acres and a quarter of land were indispensably necessary for the beneficial occupation and enjoyment of his house; that it was almost impossible to acquire meadow land at *Cricklewood* either by lease or purchase, and that he had for these reasons been induced to purchase the property in question at the above price, which reckoning interest at £4 per cent., made the six and a quarter acres stand at a rent of between £23 and £24 per acre.

The principal part of the six acres and a quarter consisted of a single field bounded by four nearly straight lines, two of them parallel to the *Edgware Road.* The remainder consisted of a small narrow field running westwardly from the north-west corner of the last-mentioned field to within 120 yards from the *Edgware Road.* At the western extremity of this smaller field were a loose horse-box, a cow-house, and a cottage, in which the Plaintiff placed his two grooms, because he had no accommodation for them upon his

property on the western side of the *Edgware Road*. The distance of the nearest point of this land from the entrance gate to the Plaintiff's house was under 120 yards.

On the 12th of September, 1864, the *Midland Railway Company* gave the Plaintiff notice that they required to purchase for the purposes of their line between *London* and *Bedford* authorized by "*The Midland Railway* (*Extension to London*) *Act*, 1863," such part as therein mentioned of the above six and a quarter acres. The piece described in this notice was a strip of land containing 1A. and 28P., bounded by two lines parallel to the *Edgware Road*, and crossing the Plaintiff's larger field nearly in the middle. There was some dispute as to the distance from the Plaintiff's house, but it appeared that the distance from the Plaintiff's entrance gate to the centre line of the intended railway was about 275 yards, and to the nearest point of the land comprised in the notice to treat about 250 yards.

The Plaintiff, on the 3rd of October, 1864, served upon the company a counter notice requiring them to take the whole of his "house."

After this the *Midland Company* applied for an Act giving them additional powers. The Plaintiff petitioned against the bill, and was examined before the Committee of the House of Commons in support of his Petition. He proposed the insertion of a clause preventing the company from exercising the powers of the Act so as to affect his property without purchasing his house and the whole of the lands occupied with it. The notice of the 3rd of October, 1864, was put in evidence by the company, and the Committee refused to insert any such clause as was proposed by the Plaintiff; and the same result followed his Petition in the House of Lords. Before both Committees the Plaintiff was cross-examined on behalf of the company. Before the Committee of the House of Commons the notice given by the Plaintiff, and the plan accompanying the notice to treat, having been verified, the cross-examination proceeded as follows:—

"This is part of your field?—Yes; which I occupy with my house.

"When you say it is part of your house, you mean part of a field occupied with your house?—Yes; in law, part of the house.

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"That gave you power, strictly speaking, to compel them to take the whole?—Yes; I consider so."

The Plaintiff in his evidence deposed that it was represented on behalf of the company to the Committees that the company could not take part of the Plaintiff's property without taking the whole, and that he (the Plaintiff) believed that these representations induced the Committees to refuse him any protecting clause.

In January, 1866, the company paid into the *Bank of England* £300, the estimated value of the land which they had given notice to take, and gave the Plaintiff a bond pursuant to the *Lands Clauses Act*. The Plaintiff thereupon filed his bill to restrain the company from taking the land in question without taking the Plaintiff's house and all the land held with it.

On the 31st of January, 1866, a motion by the Plaintiff for an injunction was refused by Vice-Chancellor *Wood*, who gave judgment as follows:—

"In the present state of the authorities I do not feel myself authorized to extend the meaning to be attributed to the word 'house' in the 92nd section of the *Lands Clauses Act*. I say in the present state of the authorities because, although there is a strong intimation on the part of Lord Justice *Knight Bruce* of a disposition to take a more extended view of the operation of the section than that which was entertained by Lord Justice *Turner*, there has been no decision proceeding upon that more extended view. To what extent the Lord Justice *Knight Bruce* is prepared to proceed, I do not clearly see on the reports before me, whereas we have a distinct view of the extent to which the Court would be justified in going if the view suggested by Lord Justice *Turner* be taken, namely, that 'house' in the 92nd section means all which would, with a reasonable latitude of construction, and having regard to all the circumstances of the property, pass under the description of the 'house' or 'messuage' in a deed or will. This appears to me to be the reasonable construction of the clause.

"Now, to apply that test to the present case, the circumstances are these:—

"The house occupied by Mr. *Steele* is a large house capable of accommodating a large family; and Mr. *Steele's* family being in fact a very numerous one, he reasonably requires the enjoyment of

and keeps a number of horses—five or more I think—for the accommodation of himself and family; and he also keeps cows, the produce of which I assume to be consumed entirely in his own family. In that state of things he requires greater accommodation than the house ever before possessed. The former occupiers of it never had the enjoyment of that property which he now holds on the other side of the road. But the comfort and necessities of his family require that he should have convenience and accommodation to a greater extent, which could not be provided upon his property on the western side of the road; he therefore procured the necessary accommodation on the other side. For this purpose he first became the lessee, and then the purchaser, at a very high price, of the property on the other side of the road. So, in order to retain this additional accommodation for his house, he has been obliged to pay a large price, and to let off a portion at a very inadequate rate in comparison to the purchase-money. He has been obliged to do all this, which he considers necessary for the comfort of his house; and he retains that portion which he conceives to be essential—about six acres—and has built, or found already built on a portion of that six acres, a cottage which he uses as a residence for accommodating his two out-door servants, his groom and undergroom. The rest of the paddock he employs for the purposes of grazing horses, and making hay for the use of the horses and cows. But it is not unimportant to observe here that he has on the other side six acres of a similar character, so that he has twelve acres altogether. Of course the construction now contended for would be equally applicable to the six acres on the western side, and perhaps more strongly applicable inasmuch as he had those six acres originally.

"I am therefore asked at this present moment to hold that taking part of the house within the meaning of this Act, would oblige the company to take the house, the whole of the curtilage, the original six acres on the western side, and the newly acquired six acres on the other side.

"This conclusion, which certainly is somewhat startling, is rested upon the view taken by the Lord Justice *Knight Bruce*, that everything which is necessary for the convenient and comfortable occupation of a house is to be included by a liberal construction

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of the Act as part of that which is protected by the 92nd section, and *Fergusson* v. *The London & Brighton Railway Company* shews the great extent to which that learned Lord is disposed to carry that principle. If I am to apply that doctrine as I am asked to do in the present case, I should be obliged to hold that, if any gentleman finding his house not sufficiently large for his convenience and wanting room for his groom and undergroom, should take a house on the opposite side of a street in *London* for the purpose of accommodating them, the Act would extend to that house. Now it cannot be held that if a gentleman, in consequence of wanting for certain members of his establishment a larger amount of accommodation than the persons who formerly occupied his house, takes a house on the other side of the road, this additional house can be considered as portion and part of his house; still less can I hold that because Mr. *Steele* has, for the comfort and enjoyment of his family, a considerable number of horses and cows, a larger number probably than the former owners kept (because they had not the same necessity for them), therefore everything that is requisite for the support of those horses and cows must be considered as a part of the house. Mr. *Rolt* put the case of a nobleman or gentleman living in the country. I know instances of noblemen who keep as many as fifty horses; but is the pasture that is necessary for the keep of fifty horses to be considered as necessarily a part of the house? Other gentlemen keep an equal number of cows for the necessities of their house or establishment, but can we consider that the fields upon which they feed are necessary for the occupation of the house?

"Now, if Mr. *Steele* had devised (I will not say demised, for possibly a deed would in this respect be construed more strictly than a will), if he had devised this house, even adding the words 'with the appurtenances,' it seems to be that this land could never have been deemed part of the appurtenances to Mr. *Steele's* house, nor have passed by the devise. Not only does the road separate it from the house (it not being within the curtilage at all), but it is a distinct property which has been simply acquired for the accommodation of those who reside in the house.

"Another class of cases has been referred to, viz., that of manufactories, where the Court has held that everything essential to

the manufactory shall be included in the term 'manufactory,' though it be separated by one road, or two roads, or even though it be at a considerable distance. As, however, in the case of a manufactory, the word does not include all the fields necessary for the pasture of the horses used in the manufactory, although actually there used, so, in the same way, I apprehend that here the word 'house' includes all that is necessary for the absolute enjoyment of the house, but cannot be said to include all that is necessary for the enjoyment of the luxuries and adjuncts which you may have for your own comfort and convenience attached to your residence. If you choose to have a certain number of horses you want pasture for them, but that does not, as it appears to me, upon any reasonable construction of the Act, make the pasture which you find for them part of your house.

"Of course I feel that the Act is to be construed in this sense liberally; that persons are not to be deprived without adequate compensation of that which they are in actual occupation of or of that which is necessary for the enjoyment of their property as a residence. But when you have ascertained all that is really and properly appurtenant to the house itself, you cannot further extend protection to all the things which for your convenience you attach to the enjoyment of your property; such things as are only comforts connected with the enjoyment of your house.

"I cannot therefore feel that I am justified, in the present state of the authorities, nor do I feel justified, so far as my own impression and opinion of the case goes, in saying that after-acquired property never attempted to be included or inclosed or connected with the house itself, is the subject of protection under this clause of the Act.

"As regards the case raised of the breach of faith upon representations made before the Committees of the Houses of Lords and Commons, I thought it right to hear what was to be said on both sides. But I am bound to say that it appears to me quite impossible to raise an equity upon this ground. The Plaintiff was present. I do not rely upon the fact of his being himself in the profession, but he appears to have been represented by counsel at the time. He heard the statement made by the opposite counsel that he would be adequately protected by the Act of Parliament

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which had already passed. This was not done as a breach of faith, but was done openly and avowedly. There was Mr. *Steele* and there was his counsel ready to contradict that averment, and ready to claim any protection if they were of a contrary opinion. It is impossible to say that the Legislature are in the slightest degree to be taken to have been influenced by that. If they were, I cannot help it. If they were misled by the ingenious arguments of counsel on one side more than on the other, I cannot help it. It would be a perfectly new head of equity to say that, because counsel on the one side were more successful than those who appeared on the other in persuading the Legislature to adopt a certain view, an equity is raised on which this Court can act.

"All that I have to do is to construe the Act of Parliament before me, and I cannot be assisted in the construction of that Act by knowing what took place before the Committee when both parties were arguing face to face until at length the Committee came to a conclusion. The motion must therefore be refused."

Mr. *Rolt*, Q.C., and Mr. *Nalder*, for the Appellant:—

It has been settled in this Court that, under the term house, in the 92nd section, everything which would pass by a conveyance of a "house" will be protected; and this Court having intimated an opinion that nothing more is protected, we do not contend for a wider interpretation, though, otherwise, we should have urged that whatever is used, and reasonably used, for the purposes of the residence, would be protected, whether it would pass by the conveyance of the "house" or not. Probably, however, the two propositions come nearly to the same thing. The land, in the present case, is necessary for the enjoyment of the house, which is one suitable for, and occupied by, a large family. The Vice-Chancellor thought that twelve acres of land was too much, and that on abstract principle—our evidence that the quantity was no larger than necessary not being met. His Honour also went on the ground that this piece of land is divided by a road and other property from the Plaintiff's house, the distance being about 250 yards. Now, upon the evidence, it will be impossible for any person taking such a house as this, and having such an establishment as a person taking such a house may be expected to have, to occupy

it with ordinary convenience without this land. The Plaintiff has no more land than is necessary for the convenient occupation of the house. It was so much a matter of necessity to him that he bought it at a price which makes it stand at a rent of £24 per acre; he occupies it himself, and there are upon it buildings used for the purposes of his establishment. We establish the necessity of the land to the house not by the Plaintiff's affidavit made for the occasion, but by his conduct for a series of years. Upon the authorities this land would pass by a grant of the house. The case of *Lord Grosvenor* v. *The Hampstead Junction Railway Company* (1) first established that the word "house," in the 92nd clause, would include everything that would pass by a grant of the house: *Spackman* v. *Great Western Railway Company* (2) is to the same effect. In *Fergusson* v. *The London & Brighton Railway Company* (3) the land in question was not occupied with the house; it was let separately from it; the occupiers of the houses only used it for playing at cricket, and it could not be called in any sense necessary to the comfortable occupation of the houses, and it would not have passed by a conveyance of the houses. A garden passes by the grant of a house because it is necessary to the house; then why should not a field pass if equally necessary? The points taken against us are, that this land is severed from the house by a road; that it is a field, not a garden; and that the extent of the whole land is eleven or twelve acres. The old authorities meet all these points. According to Lord *Coke*, by the grant of a house, the orchard, garden, and curtilage pass, and so an acre or more may pass independently of the curtilage (4). A similar principle is laid down in 'Shep. Touch.,' pp. 89—94. In *Partridge* v. *Strange* (5) is a dictum that a garden of eleven acres might pass by a grant of a messuage as being parcel of it. In *Nicholas* v. *Chamberlain* (6) it was held that a conduit and pipes would pass with a house as necessary to it, and *quasi* appurtenant. From *Hill* v. *Grange* (7) it appears that land occupied with a house for residential purposes will pass with it. In *Higham* v. *Baker* (8)

(1) 1 De G. & J. 446.
(2) 1 Jur. (N.S.) 790.
(3) 11 W. R. 1088.
(4) Co. Litt. 5, *b*.
(5) Plowd. 85, 86.
(6) Cro. Jac. 121.
(7) Plowd. 170.
(8) Cro. Eliz. 15, 16.

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Chief Justice *Anderson* lays down that land which has been occupied with a house for ten or twelve years, will pass by a grant of the house as appurtenant to it. *Clampe* v. *Clampe* (1), and *Boocher* v. *Samford* (2) tend the same way. In *Carden* v. *Tuck* (3) it was held that a garden and curtilage passed by a devise of the messuage on the ground of their being necessary to it. The statute 31 Eliz. c. 7, now repealed, enacted, that no cottage should be built without four acres of land attached to it; could it be said that the land would not pass by a grant of one of these cottages? There is, therefore, no absolute limit as to quantity. In *Doe* v. *Collins* (4) property occupied with a house, but having no direct communication with it, and lying in part on the other side of a road, was held to pass by the devise of the house, and *Press* v. *Barker* (5) supports that decision. Again, the occupation of a tenement by a servant for the purposes of his service, is the occupation of the master: *Reg.* v. *Spurrell* (6). Now, here a cottage, occupied by the grooms who are necessarily placed there for the purpose of looking after the horses while on this land, stands on this land, and this cottage at all events must be part of the Plaintiff's house. The evidence shews that the grooms are obliged to live there because the Plaintiff has no room for them on his side the road. In *Pulling* v. *The London, Chatham, & Dover Railway Company* (7) it was not intended to lay down any such rule as that a paddock used with the house, and in a reasonable sense of the term necessary to its enjoyment, would not pass with the house; the connection between the house in that case and the land in question being of the slightest description.

[The LORD JUSTICE TURNER:—Do you say that if Mr. *Steele* had let his "house" this land would have passed?]

We contend that if a gentleman at a distance had written to Mr. *Steele* saying that he wanted a house for a large family, and understood that Mr. *Steele* had one that would suit him, and Mr. *Steele* had replied—"I have a house to let which I occupy myself

(1) Cro. Eliz. 29.
(2) Cro. Eliz. 113.
(3) Cro. Eliz. 89.
(4) 2 T. R. 498.
(5) 2 Bing. 456.
(6) 14 W. R. 81. 2 R / Q B 72
(7) 33 Beav. 644; on App. 12 W. R. 969.

with nine children, and a suitable establishment, and the terms are so and so," a contract upon those terms would have included this land; *Hibon* v. *Hibon* (1) supports this view, and so do the observations of Chief Justice *Erle* in *Polden* v. *Bastard* (2) on the case of *Bodenham* v. *Pritchard* (3). In *Reg.* v. *Great Northern Railway Company* (4) it was held that a ferry which had been enjoyed with land, would pass by a conveyance of the land, "with all profits and commodities belonging to the same;" and so it was held that the railway company, by interfering with the landing on the opposite side of the river, was interfering with the land. The question, putting it in the view least favourable to the Plaintiff, is—parcel or no parcel? The authorities, as to what is included in a house for the purposes of burglary, as to which a strict construction must of course prevail, are in our favour: *Hale's* Pleas of the Crown, i. 558; *East's* Pleas of the Crown, "Burglary," 492. The stables and dairy are incontestably part of the house, and the land, without which they are of no use, being an accessory to them must also be part of it. Then the representation on behalf of the company to the Committees of the Houses of Parliament, that no special clause was necessary for the Plaintiff's protection, inasmuch as they could not take a part of his house without taking the whole, are sufficient to raise an equity against the company. It must be taken that this representation influenced the determination of the Committees.

Mr. *W. M. James*, Q.C., and Mr. *Speed*, for the company:—

This case appears to be brought forward as a *reductio ad absurdum*. A field, separated from the Plaintiff's house by a road and other property, and only used for raising hay to feed cows and horses, is alleged to be part of the house. On the same principle, if a gentleman chose to feed mutton for his own table, he might allege that the fields on which his sheep were pastured were part of his house. The contention of the Plaintiff is in fact that the word house includes all land which has been used for supplying the family resident there with what they want. When the Legislature passed the *Lands Clauses Act*, it never could have entered

(1) 11 W. R. 455.
(2) 14 W. R. 198: 1 Q. B. 156
(3) 1 B. & C. 350.
(4) 14 Q. B. 25.

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into the mind of any member of it that the effect of it would be that a company could not take a detached piece of land on one side of the *Edgware Road* without taking a property on the other side of it; a property, too, consisting of a house, garden, and paddock of six acres in a ring fence. The present case is far more favourable to the company than *Pulling* v. *London, Chatham, & Dover Railway Company;* and if that case is to be treated as a binding authority, the present suit is clearly ill-founded. As to the old cases which have been so much relied on, it was first held that "house" would include the curtilage; then, after much hesitation, that it would include a garden, both forming part of that which is actually used for residence; but none of the cases carry the matter further. It was never suggested that land used for supplying food for the family thereby became part of the house: *Lethbridge* v. *Lethbridge* (1) bears on this point. Curtilage, orchard, and garden, are all that the word has ever been held to include: *Blackborn* v. *Edgley* (2). The cases are collected in *Jarm.* Wills (3). *Evans* v. *Angell* (4), and *Lister* v. *Pickford* (5), are against the wide construction contended for by the Plaintiff. As to the groom's cottage being on this land, suppose it essential for the convenient occupation of a house that a servant should live as gatekeeper at a lodge half a mile off, is all the intervening ground therefore part of the house? Here there is moreover no direct communication between the house and the ground in question. The only connection between them is that the land is used for keeping the horses and cows wanted by the inmates. Then whether it is part of the house must, if the contention of the Plaintiff is correct, be determined by the taste and means of the occupant, whether he wishes or can afford to keep a large number of horses and cows. This is not a rational way of deciding the question of parcel or no parcel. As to what took place before the Committees, it amounted to this, that the company's counsel said: "If you can make this out to be part of your house, you are protected without any special clause; if you cannot, you are asking more than you ought to have." There was no statement amounting to a representation by the company. Moreover, the Act of Parliament which the company were then

(1) 10 W. R. 449. (2) 1 P. Wms. 600. (3) Vol. i. p. 739, 3rd ed.
(4) 26 Beav. 202. (5) 11 Jur. (N. S.) 649.

soliciting was not the Act under which the company are taking this land, but a later Act; the Plaintiff had no *locus standi* for asking a special clause for his protection as to this property. The parties were at arm's length, and it is new that a party who has failed in argument should treat the arguments of counsel on the other side as misrepresentations entitling him to get rid of the effect of the decision.

Mr. *Rolt*, in reply:—

The Respondents say, "If you go beyond curtilage and garden, where are you to stop?" It was urged similarly in the earliest cases under this section, "If you go beyond the building, where are you to stop?" but that argument did not succeed. You cannot thus reduce a legal principle to mathematical certainty. I contend that this is the principle: whatever has been used and occupied with the house, and is necessary for the enjoyment of the house, and has been enjoyed with it so long as to make it, in common understanding, a part of the premises occupied with the house, is to be treated as part of the house. I contend that this rule shews, with as much distinctness as can be looked for in cases of this nature, where we are to stop. The Respondents say nothing beyond a garden can pass. Is this urged on principle or authority? On principle, why is an orchard part of the garden? It can be only on the ground that it is necessary to the comfortable existence of the persons residing in the house. Why is not a paddock which feeds the cows that supply milk to the house equally necessary? The question of parcel or no parcel is not a question of law, but, as was said in *Fergusson's Case*, a question of situation and circumstances. It is a question for a jury. The same principle which would be applied in the case of a conveyance or devise, is to be applied to this Act. The object of the section is to protect residential enjoyment, and this is a circumstance to be taken into account by a jury in deciding on the question parcel or no parcel. *Blackborn* v. *Edgley* (1), referred to on the other side, is upon the whole in our favour, as shewing that lands might, by the force of surrounding circumstances, pass as parcel of a house. *Evans* v. *Angell* contains nothing conflicting with what we contend for, and

(1) 1 P. Wms. 600.

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Archer v. *Bennett* (1) is strongly in our favour. *Gennings* v. *Lake* (2), and *Yates* v. *Clincard* (3), support the view that lands held with a house, and necessary for its enjoyment, pass as parcel of it. As to quantity, if a field may pass at all there is no reason why eleven or twelve acres should not. It is contended that we are asking your Lordships to overrule your own decision in *Pulling's Case*; but that is not so. In *Pulling's Case* the two fields were held under two distinct leases, the house being held under another, and the connection between them was recent. Nor could they be considered even as pleasure grounds to the house, being only occasionally used by the occupiers of it. The present case is one in which I contend that a jury would come to the conclusion that this land was parcel of the house. As regards the proceedings before the Committees, Mr. *Steele's* evidence as to the representation made by the counsel for the company is not met. It is only denied that this representation was the ground on which the Committees rejected the proposed clause, and according to the authorities, both at law and in equity, that is a representation which the company is bound to make good.

SIR G. J. TURNER, L.J.:—

Having had occasion several times to consider cases of this description, and having had an opportunity of considering this case out of Court, and looking at the authorities upon it, I do not think it necessary or right to defer the statement of my opinion. The Appellant has had the satisfaction of having had his case most ably, I may say most powerfully, argued, but the argument has wholly failed to satisfy me that there is error in the judgment from which this appeal has been brought.

There are two points in the case: First, whether the land in question which is proposed to be taken by the railway company is part of the Plaintiff's house within the meaning of the 92nd section of the *Lands Clauses Act*; and, secondly, whether there is any equity arising to the Plaintiff from the alleged misrepresentation before the Committees of the House of Commons and the House of Lords. On neither of these points do I, after considering the case, feel any reasonable doubt.

(1) Lev. 131. (2) Cro. Car. 168. (3) Cro. Eliz. 704.

A suggestion was thrown out in the course of the argument that some more extended construction ought to be given to the word "house" as used in the 92nd section of the *Lands Clauses Act* than the Court has put upon it, but that view was not pressed upon us, nor do I see any reason for changing the opinion to which this Court has come upon that point. The view taken by us of the meaning of the word "house" in the 92nd section of the Act has now been acted upon for several years in this Court, and, if erroneous, it must be corrected by the House of Lords, and not by us.

The question is, whether the land in question is to be considered as part of the house within the meaning of the Act. Now, the facts of the case lie in a very narrow compass. The house is on the west side of the *Edgware Road*. The strip of land which the company propose to take is on the east side of the *Edgware Road*, by the side of a lane called *Child's Hill Lane*, leading from the side of the *Edgware Road* opposite to the house, and it is at a distance of about two hundred and fifty yards from the house. It is part of a larger field of about six acres, through the middle of which the railway is intended to pass. There is an angle, if I may so term it, of that field coming down towards the house, in the corner of which is a cottage which is used and occupied by the Plaintiff's grooms, also some outbuildings. Upon that angle of the field the hay which is grown upon that large field of six acres, and upon the other land which the Plaintiff has on the west side of the road, appears to be stacked.

These are the material facts of the case, and the question is, whether the strip of land in the middle of the six-acre field ought to be considered as part of the Plaintiff's house. Now, I take the law on that point to be that by the description of a "house," what is necessary for the convenient occupation of the house will pass. But what is contended here is, that not only what is necessary for the convenient occupation of the house passes, but that what is subsidiary to or necessary for the convenience of the occupant of the house will also pass.

9 Eq 435

The argument is this. The occupier and owner of this house, namely, the Plaintiff, keeps five horses and four or more cows. Hay must be had for the horses, pasture must be found for the cows;

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therefore the land producing the hay, and affording the pasture, is necessary for the use and occupation of the house, and that land is in law to be considered as part of the house. Speaking with all possible respect to the argument, which has been extremely able and exhaustive upon the subject, that argument is altogether founded, in my judgment, upon a fallacy. The horses and cows are not necessary for the use and enjoyment of the house. They are necessary, if necessary at all, for the personal use and enjoyment of the person by whom the house is occupied. The Plaintiff in this suit is a highly respectable gentleman of considerable fortune. He lives in this house, he thinks it right to keep five horses and four or five cows, and he has a large family. Supposing he let this house, and supposing the person who came into the house thought, "Well, instead of keeping these four or five cows and five horses, I will job the horses which I require, and the jobmaster shall feed the horses, and I will buy the milk necessary for my family instead of keeping the cows for the purpose of producing it," could it be said that this land in that point of view would be part of the house? Can the law be that the question of what will pass by the description of the house is to depend, not upon what is necessary for the convenient use and occupation of the house by whoever may chance to occupy it, but upon what will be necessary for the personal convenience and enjoyment of a gentleman of fortune if he takes the house, or a gentleman without fortune if he chooses to become the tenant. The mode of testing the question is this: supposing the Plaintiff, Mr. *Steele*, were to grant a lease of this house without any expression except "I grant," or "I agree to grant a lease of my house," I think he would be greatly surprised if the person to whom he agreed to grant the lease of that house claimed these six acres of land, and claimed all the property which lies on the east side of the road as a part of that house which he agreed to let. I cannot conceive that any doubt can be entertained upon the question that, if a lease were granted of this house *qua* house, no part of the land which is to be taken by the railway of the six-acre field, of which that land forms part, could be considered as passing with the house. As I said before, it is, in my opinion, impossible to hold that the law is in this position, that what shall pass by the

description of a house shall depend upon the personal wants of the owner or occupier of the house.

Now, a vast number of cases have been cited on this subject. Many I have looked into, and some, it is fair to confess, I have not looked into on this occasion. I think the cases lay down no general rule on the subject. The only case I think it necessary to make any observation upon is the case of *Doe* v. *Collins,* in which a coal-pen on the opposite side of a public road was held to pass as part of a house. Upon looking at that case it seems to me to be clearly distinguishable from the present, because, as I take it, the coal-pen in that case was necessary for the convenient use and occupation of the house. The person who occupied the house used the coal-pen for the purposes of trade, and kept a large stock of coals there. He used it also for the purposes of the house, inasmuch as what was required for the consumption of the house was taken by him from the coal-pen and brought into the house. And where was it deposited? In the washhouse. It is therefore plain that there was no coal-cellar in the house, and that the coal-pen was used as the coal-cellar of the house, and I think that any place used as a coal-cellar for the house would rightly be considered as necessary for the convenient use and occupation of the house. That case, therefore, which is perhaps the strongest case that has been cited, seems to me not at all to apply to the present case, in which I entertain a very decided opinion that this land is not to be considered as part of the house within the meaning of the 92nd section of the Act.

Then, as to the other point, the alleged equity arising from what is said to be a misrepresentation. I think the case amounts to no more than this. The Plaintiff asserted throughout the proceedings before both Houses of Parliament, that the Defendants would be bound to take the whole of his property, and the Defendants, or those who represented them, said, "Be it so; if so, you do not want this particular clause which you are asking us to insert in the bill." I think it is quite clear that this cannot be considered as a representation on which any equity can be founded in this Court. On both the grounds, therefore, on which this bill is founded, my opinion entirely agrees with that of the Vice-Chancellor, and this appeal must therefore be dis-

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missed. If the case had rested with me, I should have been of opinion that it should be dismissed with costs, but as I understand my learned Brother has some doubt on the case, and proposes that the costs should be costs in the cause, I do not dissent from his view on that point.

SIR J. L. KNIGHT BRUCE, L.J.:—

The conclusion of the Vice-Chancellor and that of my learned Brother, as we all know, is very likely to be right; but, however that point of probability ought to be viewed, the concurrence of their opinions is decisive against the present appeal. For myself, however, I acknowledge that I consider the question, upon the language of the Legislature, and the particular circumstances in evidence, one of considerable difficulty, and I should have preferred having the point reserved for decision at the hearing of the cause. That, however, cannot be. I agree that the costs of the appeal should be costs in the cause.

Solicitors for Plaintiff: Messrs. *Steele & Sons.*
Solicitors for Defendants: Messrs. *Beale, Marigold, & Beale.*

In re CLARK.

L. C.
1866
Feb. 9.

*Settled Estates—Leases—*1 *Wm.* 4, *c.* 65.

Where lands stand limited in fee defeasible on certain events happening, the Court has power to grant leases of the lands under 1 Wm. 4, c. 65, if all persons who would be entitled on any of the events happening are before the Court.

WILLIAM HAMBLY, by his will, devised certain lands in *Cornwall* to trustees to the use of his grandson, *W. H. L. Clark,* his heirs and assigns for ever; but the will provided, that in case the said *W. H. L. Clark* should die under the age of twenty-one years, without leaving any issue, then the trustees were to hold the said lands to the use of *J. T. S. Clark,* his heirs and assigns for ever; and in case *J. T. S. Clark* should die under the age of twenty-one years without leaving any child, then the said lands

should be held to and for the use of the daughters of the testator's deceased daughter *Caroline Clark*, and the issue of any deceased daughter, if and when they should severally attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, their and each of their heirs and assigns. And the testator devised the residue of his real estate upon trust to convert the same, and pay the income to the testator's son, *W. J. Hambly*, during his life, and hold the principal after his death in trust for such persons as he should by will appoint.

The testator died in September, 1864, leaving *W. J. Hambly* his heir-at-law. *Caroline Clark* had six children, *W. H. L. Clark*, *J. T. S. Clark*, and four daughters, all under the age of twenty-one years, and unmarried at the present time.

The six children and *W. J. Hambly* now presented a Petition under the Act 1 Wm. 4, c. 65, praying that, pursuant to the 17th section of that Act, the granting of a mining lease of part of the lands held under the will might be sanctioned. The 17th section enacts that—

> Where any *person*, being an infant under the age of twenty-one years, is or shall be *seised* or possessed of or entitled to any *land in fee or in tail*, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery to be signified by an order to be made in a summary way upon the Petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct.

The Petition was set down before the Vice-Chancellor *Wood*, who doubted if he had power to make the order, as there was here no person actually seised in fee or in tail, the estates being defeasible, and the Lords Justices felt doubts. The Petition was accordingly brought before the Lord Chancellor.

Mr. *Begg*, for the Petitioners, stated the difficulty which had arisen. It was apprehended that the application could not be made under the *Settled Estates Act*, 19 & 20 Vict. c. 120, as the

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estates here were not "in succession." *In re Burdin's Will* (1). The cases of *In re Greene's Estate* (2), *In re Evans* (3), *Anstey* v. *Hobson* (4), and *Ex parte Legh* (5), were referred to.

Lord Cranworth, L.C.:—

I am inclined to think that the Court has in this case power to grant the lease. There is this difficulty, however—that if I am wrong, the lessee will have no title; still, my opinion is that the statute ought to be construed liberally, so as to give power to grant these leases. [His Lordship then read the clause in the statute.] The first observation to be made is, that the words must include other cases, as, for instance, two co-parceners or co-heiresses must be within the meaning of the statute. That being so, I think that I may consider all these infants as together making up the fee, because every one who has an interest in the fee is before the Court. But I am by no means prepared to give an opinion that the decision in the case of *In re Evans* was wrong, because in that case the estate was not indefeasible. It might have been that, in the result, the estate might go to some person not before the Court, and the order made would then not affect the Petitioners, but somebody not before the Court. That cannot be said in the present case, as we have the owners of the whole fee simple before the Court, all asking for the lease. It appears to me, therefore, that the Court may make the order.

Solicitor: Mr. *J. E. Fox.*

(1) 7 W. R. 711; 5 Jur. (N. S.) 1378.
(2) 10 Jur. (N. S.) 1098.
(3) 2 My. & K. 318.
(4) 1 Sm. & Giff. 505.
(5) 15 Sim. 445.

YATES *v.* JACK.

Ancient Lights—Injury—Form of Decree.

L. C.
1866
Jan. 16, 19, 21, 22; *March* 24.

The owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained.

Where an injunction was granted to restrain the interruption of an ancient light, the Court gave the Defendant leave to apply in order to ascertain whether any building which he might propose to erect would cause such an interruption.

THE Plaintiffs in this case, *G. B. Yates* and *H. G. Yates*, were merchants carrying on an extensive business at a warehouse, No. 3 and 4, *Lower East Smithfield*, in the city of *London*, which was rebuilt by them in 1837, and had a frontage of twenty-nine feet. The width of the street was twenty-five feet two inches, and the Defendant *Charles Jack* was the owner of the land on the opposite side of the street, with a frontage of ninety feet, on which buildings formerly stood, some thirty-two feet high to the parapet, and some twenty feet. The Defendant had lately pulled down these buildings, and proposed to erect others, set back six feet, but sixty-seven feet high, immediately opposite to and much wider than the frontage of the Plaintiffs; and the Plaintiffs filed this bill to restrain the Defendant from obstructing their ancient lights. A great deal of evidence was entered into on both sides, in order to prove, on behalf of the Plaintiffs, that their warehouse would be materially darkened and that they would not be able to carry on their business so well, especially in judging samples; and on the part of the Defendant, that no material injury would be done to the Plaintiffs, and particularly that there would be ample light for the business carried on by them; and, in fact, that the screening off of the direct rays of the sun would be a positive advantage. The cause came before the Vice-Chancellor *Wood*, on motion for decree, and his Honour made a decree declaring that the Plaintiffs were entitled to the free access of air and light to such an extent as would enable them to enjoy their messuage and warehouse for the purpose of their business without

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any material diminution of their former use and enjoyment; and, it appearing to the Court that the buildings proposed to be erected by the Defendant would materially affect such use and enjoyment, that the Defendant ought to be at liberty to adduce further evidence with reference to the effect of the proposed erections, or with reference to the possible alterations thereof to such an extent as not to interfere with the rights of the Plaintiffs; and an inquiry was directed whether any and what alteration in the Defendant's design was necessary, or proper, or sufficient for the purpose of preventing the erections from interfering with the right of the Plaintiffs as thereinbefore declared; and in the mean time the Defendant was restrained from building to a greater height than thirty-five feet (1).

The Plaintiffs appealed from this decree.

Mr. *Rolt*, Q.C., and Mr. *G. N. Colt*, for the Plaintiffs:—

We object to the declaration in the decree as limiting our right to light and air, and giving us only so much as will enable us to carry on our present business, and we also object to the Defendant being allowed to adduce further evidence, as there has been ample time and much evidence, and he ought not to be allowed to improve his case. The law on the subject of light and air is laid down in *Jackson* v. *Newcastle* (2); *Tapling* v. *Jones* (3), and *Clarke* v. *Clark* (4). It is true that a reference was directed in *Stokes* v. *City Offices Company* (5), which was affirmed on appeal, but that

(1) July 18, 1865. The Vice-Chancellor *Wood* said that the abolition by the Legislature of the custom of the city of London, and other customs as to ancient lights, entirely precluded him from taking into consideration, if he could otherwise have done so, any point which might be urged as to the necessity of making a difference between the circumstances of buildings in towns and in other places. The Legislature thought fit to abolish all such customs, and the case must be considered as if the buildings had stood in any other part of *England*. His Honour then commented on the evidence, and came to the conclusion that the Plaintiff had made out a reasonably strong *primâ facie* case, but it was possibly a case in which it might be of considerable service to call in some one whom the parties could agree upon, as to the questions whether the proposed buildings would be an injury, and whether some modification might not prevent that injury; and his Honour then made the above-mentioned decree.

(2) 33 L. J. (Ch.) 698; 10 Jur. (N. S.) 688.

(3) 13 W. R. 617; 11 Jur. (N. S.) 309.

(4) Law Rep. 1 Ch. 16.

(5) 11 Jur. (N. S.) 560.

was not equivalent to giving either party leave to bring in further evidence.

The *Attorney-General* (Sir *R. Palmer*), Mr. *G. M. Giffard*, Q.C., and Mr. *Horton Smith*, for the Defendant:—

We say that the decree gives the Plaintiffs too much; in fact that the decree ought to have been against them. The Plaintiffs must shew an actual injury: *Attorney-General* v. *Nichol* (1); and the Court will not interfere in every case, but will leave the Plaintiff to his remedy at law. The Plaintiffs only ask to be enabled to carry on their business as before, and that is given to them by the decree.

Mr. *Rolt*, in reply.

March 24. Lord Cranworth, L.C., after stating the facts of the case and commenting on the evidence on both sides, particularly on that of the Plaintiffs as to the injury they would suffer, continued:—

On the other hand, on behalf of the Defendant, there are a great number of witnesses, merchants and vendors engaged in business similar to that of the Plaintiffs, who give it as their decided opinion that even after the erection of the proposed new buildings there will be ample light for enabling the Plaintiffs to conduct their business as well as they did formerly. Some of them go so far as to say that for the purpose of sampling a strong direct light is not desirable, and that the erection of the new building, by screening the sun's rays, will improve the quality of the light admitted to the Plaintiffs' windows. The evidence satisfies me that for some purposes of their trade it is necessary at times to exclude the direct rays of the sun, and that in what is called sampling, a subdued light may be better than direct sunlight. But this is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight, and an attentive consideration of the evidence of the trade witnesses, on the one

4 Eq 431

(1) 16 Ves. 338.

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side and on the other has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the Plaintiffs in the conduct of their business. I desire, however, not to be understood as saying that the Plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognized by the statute 2 & 3 Wm. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me which it does not, that for the purpose of their present business a strong light is not necessary, and that the Plaintiffs will still have sufficient light remaining, I should not think the Defendant had established his defence unless he had shewn that for whatever purpose the Plaintiffs might wish to employ the light, there would be no material interference with it. I need not further investigate the evidence, but the result of it is to convince me that the new buildings proposed to be erected by the Defendant cannot fail to inflict a serious injury on the Plaintiffs by materially obstructing the light which they have heretofore enjoyed.

The consequence is, that they are entitled to an injunction restraining the Defendant from erecting any building so as to darken, injure, or obstruct any of the ancient lights of the Plaintiffs as the same were enjoyed previously to the taking down by the Defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected, which will cause any such obstruction. Whether the buildings already erected not exactly opposite to the Plaintiffs' messuage will have that effect when the whole of the Defendant's buildings are finished, is a matter on which the evidence does not enable me to come to any satisfactory conclusion, and I am therefore obliged to frame the decree in this general form, leaving it to the Plaintiffs to apply by notice in case the terms of the injunction are violated. I shall, however, be willing to introduce a proviso into the order similar to that adopted in the case of *Stokes* v. *City Offices Company* (1), enabling the parties to come before the chief

(1) 11 Jur. (N. S.) 560.

clerk in order to have it ascertained whether any proposed addition to the building will or will not be a violation of the injunction; and it must also in like manner be left open to the Plaintiffs to shew, if they can, that the buildings already erected materially interfere with the light heretofore enjoyed by them.

In deciding that what the Defendant proposed to do would cause material injury to the Plaintiffs, I am only arriving at the same conclusion at which the Vice-Chancellor arrived. But I cannot concur with him in thinking that the Court ought to make any declaration narrowing or appearing to narrow the right of the Plaintiffs to the quantity of light heretofore used by them for the purpose of their business. Nor can I think that the state of the evidence was such as to make it proper, instead of finally disposing of the case, to authorize the parties to go into further evidence. The case was, I think, ripe for a decree in the terms which I have indicated. The issue raised on the pleadings is whether the Defendant by raising his new buildings to the height of sixty-seven feet will or will not cause material injury to the Plaintiffs. On that point the Vice-Chancellor thought, as I think, that the anticipated injury certainly would result. In such circumstances I do not think it open to the Court to refuse to make a decree, leaving it to the parties to raise what would be substantially a new issue, *i. e.*, whether by altering his original intention the Defendant may not be able to take a course not likely to cause injury to the Plaintiffs. That would in truth be a new suit. The Defendant must also pay the costs of the cause up to and including the motion for decree.

I cannot part with this case without saying that I have come to the conclusion at which I have arrived with great reluctance. It was stated at the bar, and, I believe, correctly stated, that up to the passing of the Act of 2 & 3 Wm. 4, c. 71, there was a local custom in the city of London, according to which the owner of a house in any street was permitted to raise it to whatever height he might think fit. All such local customs were abolished by the Act I have alluded to. I suppose therefore that the Legislature thought the custom to be one which was productive of inconvenience. But considering that, assuming the existence of the custom, all persons who were owners of houses in narrow streets

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must have known when they purchased them, to what liabilities they were exposed from the buildings of their opposite neighbours, I cannot but think the advantages derived from the custom probably exceeded its evils. The growing necessity for lofty buildings is shewn by the great multiplication of them in all parts of the metropolis, and I cannot but fear that serious inconvenience may be felt by the abolition of the alleged custom, assuming that I was correctly informed as to its existence prior to the statute. With all this however, sitting here to administer the law, I have no concern.

Solicitors for the Plaintiffs: Messrs. *Church & Co.*
Solicitors for the Defendant: Messrs. *Chauntler & Crouch.*

L. C. 1866 *Feb.* 24; *March* 3.

DRENNAN *v.* ANDREW.

Practice—Appeal in Formâ Pauperis.

When a party has obtained the common order to sue *in formâ pauperis* at any stage of the suit, it will carry him through all subsequent stages; and no special order is required to enable him to appeal without payment of a deposit.

THIS was an application on behalf of the Plaintiff in this suit, who was suing *in formâ pauperis,* that his Petition of appeal might be received without paying the usual deposit.

The facts of the case were as follows:—

The bill was filed in May, 1860, at which time the Plaintiff was not suing as a pauper. On the 5th of March, 1861, a decree was pronounced by Vice-Chancellor *Kindersley* declaring the Plaintiff entitled to a share in a house, and directing a sale.

On the 30th of November, 1865, the Plaintiff obtained an order on the common Petition at the Rolls for leave to sue *in formâ pauperis.* His object in obtaining this order was to apply to the Vice-Chancellor in Chambers to add to the decree a direction to take an account of rents received and in the hands of the Defendant. This application was, however, refused; and thereupon Plaintiff presented his Petition for a rehearing of the decree.

The Petition was signed by counsel and taken to the Secretary's office for the Lord Chancellor's *fiat;* and the order to sue *in formâ pauperis* produced, in order that it might be set down to be heard without any deposit being made. The Lord Chancellor's Secretary, however, refused to receive it, on the ground that by the present practice, no order to sue *in formâ pauperis* having been obtained until after decree, the common order was not sufficient, but that a special order was requisite.

Mr. *Elderton*, in support of the application, referred to *Seton* on Decrees (1), and *Daniell's* Chancery Practice (2), where the practice is stated to be that where a party is made a pauper for the purpose of appealing, he must obtain leave from the Lord Chancellor or Lords Justices on a special application; but that this is not necessary when he has sued *in formâ pauperis* in the Court below. In the present case the Plaintiff had carried on proceedings *in formâ pauperis* in the Vice-Chancellor's Chambers, and was entitled to appeal as a pauper without special leave. He also referred to *Bland* v. *Lamb* (3); *Bradberry* v. *Brooke* (4); *Grimwood* v. *Shave* (5); *Clarke* v. *Wyburn* (6).

The LORD CHANCELLOR reserved judgment that search for precedents might be made by the Registrar (7).

(1) Vol. ii., p. 1271, 3rd ed.
(2) Vol i., p. 40, 4th ed.
(3) 2 Jac. & W. 402.
(4) 4 W. R. 699.
(5) 5 W. R. 482.
(6) 12 Jur. 167.
(7) The Reporter has been favoured by the Registrar, Mr. *Monro*, with the following note upon the practice on this point:—

"By the 11 Hen. 7, c. 12, poor persons were allowed to sue *in formâ pauperis*. By the 23 Hen. 8, c. 15, a pauper was not to pay costs, if he was unsuccessful, but was to suffer *other punishment* in the discretion of the judge. Accordingly the common form of the order allowing a poor person to sue *in formâ pauperis* contained this clause: 'But if the matter shall fall out against the Plaintiff, he shall be punished with whipping and pillory.'

"There are many orders of the time of Queen *Elizabeth* which contain this clause; and there was one instance, in 1596, in which Sir *Thomas Egerton*, L. K. (afterwards Lord Chancellor *Ellesmere*) ordered a *female* pauper Plaintiff to be flogged; and Mr. *Lambard*, an old Master in Chancery, the real author of *Cary's* Reports, being then present, said that so was the opinion of all the justices of the equity of the statute 23 Hen. 8, c. 15, for the Chancery and Star Chamber; the statute mentioning only actions at Common Law.—(Harg. MSS. No. 249, fol. 6.)

"At this time no suitor could regularly appeal from a decree in Chancery.

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March 3. LORD CRANWORTH, L.C., directed the Petition of appeal to be received. His Lordship said that there appeared to be some conflict of practice on the point, but he was of opinion that where the common order to sue *in formâ pauperis* had been

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It is said in some of the old orders in the time of *Elizabeth*, speaking of the Court of Chancery, 'from which Court the subject has no appeal.' As to persons not paupers, this practice was changed, and their right to appeal established; but as to paupers there appears to have prevailed, as late as 1774, and perhaps later, an idea that a pauper could not appeal.

"In *Taylor* v. *Bouchier* (2 Dick, 504), before Lord Chancellor *Apsley* (afterwards Lord *Bathurst*) on 21st July, 1774, it was said that 'a pauper cannot appeal, and on inquiry of the Bar that proposition could not be disproved, and, in fact, was assented to.' *Taylor* v. *Bouchier* was an appeal on which a deposit had been previously made (27th April, 1774) in the usual way; and therefore the proposition reported by Mr. *Dickens* must have been a statement casually made in the course of the argument, but not arising in the case before the Court.

"In *Bland* v. *Lamb* (2 Jac. & W. 402) the proposition that a pauper could not appeal is said to have been adverted to *arguendo* by Mr. *Pemberton*, and condemned by Lord *Eldon*, who is stated to have said 'it was a very singular proposition; and that he could not see why, because a party was poor, the Court should not set itself right.' And the report proceeds to say that the usual order for setting down the appeal was made.

"The inference from the above is, that an order was made for setting down the petition of appeal *in formâ pauperis*. This was not so; and there is nothing on record as to any party suing or defending *in formâ pauperis*, except an entry in the minute-book of the registrar (Mr. *Crofts*), of a motion by Mr. *Pemberton*, for the Defendant, that he might defend the suit *in formâ pauperis*.—'Cur.: Take the order, if I find nothing in my notes to the contrary.' But no order to defend *in formâ pauperis* was drawn up, and on the 27th November, 1820, the Defendant appealed, and paid a deposit on the appeal in the usual way. It was therefore not the fact that the usual order for setting down the appeal *of a pauper* was made.

"*Bland* v. *Lamb*, therefore, is no instance of an order to set down an appeal of a pauper without a deposit. The order has no existence. But *Bland* v. *Lamb* is cited by Mr. *Sidney Smith*, (1 *Smith's* Chancery Practice, p. 716, 7th ed.), as an authority for the proposition that liberty may be obtained to sue *in formâ pauperis* at any stage of the proceedings. This proposition rests on much older authority. It is to be found in *Harrison's* Chancery Practice, vol. i. p. 260 (4th ed.)

"In *Heaps* v. *Commissioners of Churches*, (8th June, 1830; Reg. Lib. A. 1829, fol. 1527), the order is said to have been drawn up on the authority of *Bland* v. *Lamb*.

"In *Clarke* v. *Wyburn*, 1st March, 1848 (12 Jur. 167), the order was made by Lord Chancellor *Cottenham*, following *Heaps* v. *Commissioners of Churches*; and in *Bradberry* v. *Brooke*, 9th July, 1856 (4 W. R. 699), a like order was most unwillingly made by the Lords Justices on the same authority.

"The order in *Grimwood* v. *Shave*,

obtained at any time during the suit, such order was sufficient to carry the pauper through all the stages of the suit; and that in that case an order for leave to appeal *in formâ pauperis* was unnecessary.

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Solicitor: Mr. *Strangways.*

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Jan. 22;
March 8.

Mines and Minerals—Reservation in Deed—Freestone—Quarries.

In a conveyance of land in *Northumberland* a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, &c.:—

Held, varying the decree of *Kindersley*, V.C., that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry.

THIS was an appeal from a decree of Vice-Chancellor *Kindersley* (1).

The bill was filed for an injunction to restrain the Defendants, *Frederick William Wilson*, *George Besley Wilson*, and *John*

20th April, 1857 (5 W. R. 482), was made by Lord Chancellor *Chelmsford*, allowing the Plaintiff to appeal *in formâ pauperis*. On this occasion his Lordship required a very special certificate to be made by counsel, which is entered in the Registrar's minute-book. The order is drawn in the exact form of the three last-mentioned orders. I do not recollect any other instance of such a certificate having been required.

"See also *Dresser* v. *Morton*, 17th July, 1847, L. C. (2 Phil. 286). *Ex parte* order to defend *in formâ pauperis* obtained after decree, on common affidavit on a petition at the Rolls; Defendant was afterwards dispaupered, and motion was made to discharge the order to dispauper him, *i. e.*, to restore the pauper order. It was not argued by any one against this that the common order could not be had *after decree*.

"In *Hill* v. *Gomme* (decree by the Master of the Rolls, 10th August, 1839), Plaintiff is described as a pauper. Therefore the order to sue had been obtained *before* decree. Decree appealed from in November, 1839, and no deposit made, without any special order to dispense with it. Appeal heard and disposed of 24th December, 1839. This, therefore, is a case of the common order, had before decree, carrying the Plaintiff through the suit even to and beyond the appeal."

(1) Reported, 2 Dr. & Sm. 395.

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Simpson, from working a bed of freestone or sandstone, and from selling or removing the stone gotten on an estate at *Long Benton*, in the county of *Northumberland*, and for an account and an assessment of damages in respect of previous workings of stone on the said estate.

The estate from which the freestone in question was worked was purchased in 1801 by *Henry Utrick Reay*, of *Richard Wilson*, under an order of the Court of Chancery, made in a suit for administering the estate of the grandfather of *Richard Wilson*, and was conveyed to him by indenture of lease and release dated the 9th and 10th February, 1801. The indenture of release contained the following exception—"Excepting nevertheless unto the said *Richard Wilson*, and all and every other person or persons seised or entitled, either at law or in equity, of or to all that close or parcel of land called *South White Ridges*, under the last will of *Richard Wilson*, the father of the said *Richard Wilson* (*inter alia*), *all mines and seams of coal, and other mines, metals or minerals*, as well opened as not opened, within and under the said closes or parcels of ground, hereby granted and released, with full liberty to search for, dig, bore, sink, win, work, lead, and carry away the same, and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, and to drive and make drifts, drains, levels, staples, watergates and watercourses of any kind, in, over, under, through, or along all or any part of the said closes or parcels of ground, with sufficient ground room and heap room, and to erect fire-engines and other buildings, and to exercise, do and perform every liberty, matter, and thing necessary for digging, sinking, winning and working the said collieries, mines and minerals, and free way-leave and passage to and from the said collieries, mines and minerals, in, through, and over the same closes or parcels of ground, or any of them, or any part thereof respectively with agents, workmen, horses, waggons, carts and carriages, with liberty to make all such waggon-ways, and other ways, as shall be necessary and convenient for that purpose, and according to the usage or custom of the country, paying a reasonable satisfaction for all damages or spoil of ground to be occasioned thereby."

Henry Utrick Reay died in 1828, and under his will in the

events which had happened, the Plaintiff, *Elizabeth Ann Bell*, the wife of *Matthew Bell*, was entitled for her life, to her separate use, to the rents and profits of the estate at *Long Benton*, and also to the ultimate reversion in fee, subject to certain intermediate remainders. The other Plaintiff was the surviving trustee of the will.

The mines excepted and reserved by the deed of the 10th of February, 1801, became vested in the Defendant, *Frederick William Wilson*, who, by an indenture of the 2nd of October, 1858, demised the quarries and beds of stone under some of the closes comprised in the deed, for a term of ninety-nine years, to his son, the Defendant, *George Besley Wilson*; and he again, by an agreement dated the 4th of December, 1862, let the same quarries and beds of stone to the Defendant, *John Simpson*.

The closes of land comprised in the deed of 1801 are on the surface of the clay or shale formation overlying a bed of freestone, beneath which there is a seam of coal, under which there is another bed of freestone. The first-mentioned bed of freestone is at a depth varying from about six feet to about forty feet below the surface of the closes, and it varies in depth or thickness from about thirty-six feet to about seventy feet.

In or about the year 1855, the Defendant, *Frederick William Wilson*, began to work the stone under the surface of the closes by open quarrying, but the workings not being then found profitable, were soon afterwards abandoned.

In the month of December, 1862, however, the Defendant, *John Simpson*, began again to work the stone under some of the closes in the same manner, laying open the ground to a depth varying from six feet to twenty feet below the surface, for the purpose of quarrying the freestone.

Under these circumstances the Plaintiffs, after some previous correspondence, filed their bill on the ground that the freestone was not included in the exception contained in the deed of 1801, and praying for an account and injunction, as before stated.

The parties had admitted, as part of the evidence in the cause, that part of the bed of freestone was about six feet below the surface, and that a portion of the said bed was of sufficient thickness to be capable of being worked by underground workings;

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yet that there had been up to that time no instance of any underground workings of stone in the county of *Northumberland*.

The Vice-Chancellor was of opinion that the freestone was not included in the reservation in the deed, and that the Defendants had no right to work it either by underground mines or by open quarries: and he accordingly granted the relief prayed by the bill. From this decision the Defendants appealed.

Mr. *Baily*, Q.C., and Mr. *Burdon*, for the Plaintiffs:—

The words in the reservation are "mines, metals, or minerals." The term "mineral" being derived from "mine," means that which is gotten by underground working as distinguished from what is dug from quarries which are worked from the surface: *Darvill* v. *Roper* (1); *Brown* v. *Chadwick* (2); *Listowel* v. *Gibbings* (3); *King* v. *Dunsford* (4).

Even if the Court should hold that the freestone is included in the exception, the grantor is only entitled to work it by underground mining, and not to destroy the surface by opening quarries: *Rex* v. *Inhabitants of Sedgley* (5); *Rex* v. *Brettell* (6). The expressions in a reservation are to be construed in favour of the grantee: *Harris* v. *Ryding* (7). If the construction contended for by the Defendants is correct, the interest of the Plaintiffs would be seriously damaged, for the Defendants may destroy the ground at any part of the estate they please.

Mr. *G. M. Giffard*, Q.C., and Mr. *T. Stevens*, for the Defendants:—

The word "minerals" has been held to include stone: *Earl of Rosse* v. *Wainman* (8); *Micklethwait* v. *Winter* (9). In the *Railway Clauses Consolidation Act*, 8 & 9 Vict. c. 20, s. 77, slate is included in the term "mineral."

The reservation of minerals includes all reasonable means of getting them: *Earl of Cardigan* v. *Armitage* (10). There is no such distinction between a mine and a quarry as contended for by the Plaintiffs. In *Johnson's* Dictionary the words in question are

(1) 3 Drew. 294.
(2) 7 Ir. C. L. Rep. 101.
(3) 9 Ir. C. L. Rep. 223.
(4) 2 Ad. & E. 568.
(5) 2 B. & Ad. 65.
(6) 3 B. & Ad. 424.
(7) 5 M. & W. 60.
(8) 14 M. & W. 859; S. C. 2 Ex. 800.
(9) 6 Ex. 644.
(10) 2 B. & C. 197.

thus defined:—"Mine" (*mine*, French; *mwyn*, or *mwn*, Welsh, from *maen*, lapis, in the plural *meini*), a place or cave in the earth which contains metals or minerals.—"Mineral," fossil matter; matter dug from mines.—"Quarry" (*quarriere, quarrel*, French; from *carrig*, Irish, a stone; *craigg*, Erse, a rock). A stone mine; a place where they dig stone.

In *Jacob's* Law Dictionary, "mines" are defined as quarries, or places whereout anything is dug. "Mineral," as anything that grows in mines, and contains metals.

We also rely upon the acquiescence of the Plaintiffs. The workings were begun in 1855, and compensation was accepted by the tenant for surface damage.

Mr. *Baily*, in reply.

March 8. SIR G. J. TURNER, L.J., after stating the facts as mentioned above, and the decree of Vice-Chancellor *Kindersley*, continued:—

The questions upon this appeal are, whether under the exception contained in the deed, the Defendants are entitled to the upper bed of freestone, and whether, if they are so entitled, they are entitled to get the stone by the mode of open quarrying which they have adopted.

Upon the first of these questions, I regret to say, that I find myself unable to agree in the conclusion at which the Vice-Chancellor has arrived; the words of this exception are most general and comprehensive. [His Lordship read the clause.] And if it can be held that the freestone is not included in these words, it can only be, as it seems to me, upon one or other of these grounds: either that the freestone is not a mineral, or, that being a mineral, the nature or context of the deed shews that it was not intended to be included. But the cases are, I think, quite decisive upon the point that freestone is a mineral, and I can find nothing in the nature or context of this deed to show that it was not intended to be included in the exception. The Vice-Chancellor appears to have considered that the intention was to reserve only that which was ordinarily gotten by a miner in the county of

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Northumberland at the time of the execution of the deed, but the deed does not refer to what is ordinarily gotten, and I think this construction goes too far in cutting down the effect of the general words, which, as I take it, in the absence of manifest intention or context to the contrary, ought to have their full effect. This construction would probably operate to prevent the general words extending to many other subjects than freestone. If, indeed, effect could not be given to the exception without destroying the previous grant, this might be considered to shew an intention that the exception should not include the freestone, but I do not think this would be the case. It was argued for the Plaintiffs that it appears from the deed that the parties must have known the position of the different strata in these closes of land. But this argument cuts both ways, for it may well be that the general words were inserted in consequence of that knowledge.

Upon the first question, therefore, I respectfully differ from the Vice-Chancellor, but upon the other question I entirely agree in his opinion. I am satisfied that it was not intended by this deed that the freestone should be worked by the means which the Defendants have adopted, or otherwise than by underground mining. The language of the exception points, I think, to this conclusion; it is an exception of "mines within and under the lands, whether opened or unopened," words which are ordinarily used with reference to underground workings. And although, perhaps, it cannot be said that there are not words in the clause which might be construed to extend to and authorize workings upon the surface of the closes, it cannot, I think, be denied that the clause, taken as a whole, points much more strongly to underground workings.

Some question was made in the course of the argument as to the meaning of the words in the deed, "mines, metals, or minerals;" and I am much disposed to agree with the construction which Mr. *Burdon* put upon these words, that they mean mines, whether of metal or of mineral. Then, what is a mine? Upon reference to the lexicographical part of the *Encyclopædia Metropolitana*, I find it there said that the word "mine" is derived from a Latin word of the lower ages, "*minare*," signifying "*ducere*, to lead;" and the interpretation of the word is "to draw or lead, *sc.*, a way,

or passage underground, a subterraneous duct, course, or passage, whether in search of metals or to destroy fortifications, &c.;" and the cases of *Rex* v. *The Inhabitants of Sedgley*, and *Rex* v. *Brettell*, seem to me to support this definition to this extent, at least, that mines are underground workings; and that this is so is, I think, much confirmed by the definition of the word "quarry," which is to be found in the same dictionary. The word "quarry" is there stated to be derived from the French word "*quarriere*," and the derivation is followed by this description, "In the Latin of the lower ages, *quadratarius* was a stonecutter *qui marmora quadrat*, and hence *quarriere*, the place where he *quadrates*, or cuts the stone in squares; the place where the stone is cut in squares; generally, a stone-pit;"—clearly, therefore, referring to a place upon or above, and not under, the ground. My opinion, therefore, on the second point entirely agrees with that of the Vice-Chancellor.

The case then is, in this singular position, that the Defendants were entitled to the stone, working it by underground mines, but were not entitled to work it from the surface; the consequence, as I think, must be, that the Plaintiffs are entitled to the account directed by the decree, of what has been got by the improper working. There is not, I suppose, any dispute between the Plaintiff and her husband, the Defendant *Matthew Bell*, and it is not therefore material to consider whether the Plaintiff, *Elizabeth Ann Bell*, is entitled to the money which may be found due upon the account, by virtue of her separate estate for life, or of the remainder in fee, which is vested in her. The only question as to these moneys can be, whether the Plaintiff, *Elizabeth Ann Bell*, is entitled to them, as against the persons having estates in remainder, prior to the ultimate limitation in fee vested in her; and I think, upon the authority of the case of *Bewick* v. *Whitfield* (1), that she is so entitled.

It was objected on the part of the Defendants, the *Wilsons*, that they had been improperly saddled with the costs of the suit, but I think that no decree could have been had against the Defendant *Simpson* in their absence, and that they were, therefore, proper parties to the suit; and as they have contested the rights of

(1) 3 P. Wms. 267.

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the Plaintiff, I think they have been properly charged with the costs. In the result, the declaration contained in the decree must be altered to meet the view which I have above expressed, but in other respects the decree must stand.

SIR J. L. KNIGHT BRUCE, L.J., concurred.

Solicitor for the Plaintiffs: Mr. *J. H. Clayton.*
Solicitors for the Defendants: Mr. *G. Brewis;* Mr. *T. G. Gibson.*

L. JJ. 1866 *Jan.* 13, 15; *March* 8.

CHADWICK *v.* TURNER.

East Riding Registry Act—Concealed Will—Priority—Notice.

Under the *East Riding Registry Act*, 6 Anne, c. 35, *Held*, affirming the decree of the Master of the Rolls, that no protection is given to devisees under a will which has not been discovered by them till the expiration of six months after the death of the testator, and where, in consequence, no memorial of the will or of the impediment preventing its registration has been registered by them within the time prescribed by the Act.

A title which has been registered can only be affected by clear and distinct notice, amounting in fact to fraud.

Whether a registered equitable mortgagee, without notice, is affected by the notice of his mortgagor—*Quære.*

4 Ch 744
6 Ch 684-1.
7 H L 140-4
18 Ir 353.
20 L D 621-6

THIS was an appeal from a decree of the Master of the Rolls.

Sarah Gooddy was at the time of her death equitably entitled in fee, among other things, to a freehold house and premises in *Kingston-upon-Hull*, which had been conveyed to a trustee for her separate use. She died on the 27th of January, 1854, and her husband, *Richard Gooddy*, on the 10th of May following.

On the death of *Sarah Gooddy* search was made for a will, but none was at that time found, and the Defendant, *William Atkin*, entered into the possession of her real estates, including the house in question, as her heir-at-law, and the title-deeds were delivered to him.

By an indenture dated the 9th June, 1862, *William Atkin* conveyed the house and premises, together with other property, to the Plaintiff, *James Chadwick*, in fee, by way of mortgage for securing the repayment of £1420 and further advances.

On the execution of the mortgage, the title-deeds of the house and premises were delivered to the Plaintiff, and he duly registered the deed in the Registry of the East Riding of *Yorkshire*, on the 12th of July, 1862.

After the death of *Sarah Gooddy*, her husband, *Richard Gooddy*, went to reside with the Defendant *Ann McKee*, who was his wife's niece; and after his death, in or about the month of June, 1861, *Ann McKee* discovered amongst some old papers belonging to him a will of *Sarah Gooddy*, duly executed, dated the 21st April, 1841. By this will the testatrix devised the house and premises at *Kingston-upon-Hull*, describing them as under lease to *William Poole*, to her husband, *Richard Gooddy*, for his life, with power of distress if the rent of £21 should be in arrear and unpaid as therein mentioned; and after the decease of the said *Richard Gooddy* she devised the estate to *William Atkin*, to the intent that her niece, *Mary Ann Prance*, during her life, should receive the rent of £21, and after the decease of the said *Richard Gooddy* and *Mary Ann Prance*, in trust to sell and divide the proceeds among the children of *Mary Ann Prance*.

At the time when this will was discovered, *Mary Ann Prance* was dead, leaving four children, one of whom was dead and the others were parties to the suit.

Ann McKee, taking no interest under this will, gave no notice of it to any of the devisees. In September, 1863, she discovered a codicil to the will, in an old pocket-book of *Richard Gooddy*. By this codicil, which was dated the 7th of December, 1853, the testatrix devised the property, after the death of *Mary Ann Prance*, to *Ann McKee* for her life; and at her death, the house and premises were to be subject to the provisions of the will.

On the discovery of this codicil, *Ann McKee* communicated the will and codicil to her solicitor, who informed the other parties interested. *William Atkin*, however, did not admit their title, and after some correspondence, the Plaintiff filed the present bill on the 30th of November, 1863, against *William Atkin* and the parties claiming under the will and codicil, praying for a foreclosure, and a declaration that the interests of the devisees under the will and codicil might be postponed to the Plaintiff's mortgage.

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At the time of the filing of the bill, neither the will nor codicil had been registered under the *East Riding Registry Act.* The Plaintiff in his bill alleged that the Defendant *William Atkin,* was heir at law of *Sarah Gooddy;* but he did not state the relationship and produced no direct evidence of the fact. He relied upon the registration of his deed as giving him priority over the will and codicil, and denied that he had any notice of the existence of the will and codicil at the time of the execution of the mortgage; and he filed an affidavit repeating this denial.

After the filing of the bill, on the 4th of February, 1864, the will and codicil were registered according to the provisions of the Act.

The Defendants, the devisees under the will, by their answers, did not deny that *William Atkin* was the heir-at-law of the testatrix, but they insisted that he had notice of the will and codicil.

On the 9th of March, 1864, *Ann McKee,* in making a further search among *Richard Gooddy's* papers, discovered a second codicil to the will of *Sarah Gooddy,* dated the 20th of December, 1853, which was put in issue in the cause by supplemental answers filed by the Defendants *Ann McKee* and *William Richard Prance.* By this codicil, *Sarah Gooddy* directed her husband, *Richard Gooddy,* to pay several small legacies, and it appeared by the evidence that *Richard Gooddy* paid two of these legacies to the Defendant, *William Atkin,* for the purpose of their being paid over by him to the legatees, and that *William Atkin* gave a receipt to *Richard Gooddy* for the amounts paid over to him, expressing it to be for legacies left by *Sarah Gooddy.*

William Atkin filed an affidavit in reply to this evidence, explaining the circumstances under which he paid these sums of money, and denying any knowlege of the will and first codicil.

The Master of the Rolls, at the hearing of the cause, directed an inquiry whether the Defendant, *William Atkin,* was the heir-at law of *Sarah Gooddy,* and declared that if it should appear that he was such heir, then the Plaintiff's mortgage had priority over the interests of the Defendants, the devisees, and made the usual foreclosure decree in the Plaintiff's favour.

From this decree, the Defendants, *Ann McKee* and the children of *Mary Ann Prance*, appealed (1).

Mr. *Hobhouse*, Q.C., and Mr. *Kay*, for the Plaintiff:—

The will and codicils not being registered till ten years after the death of the testatrix, the devisees can have no priority over the registered mortgage unless they can bring themselves within the 15th section of the Act. If the non-finding of the will was an "impediment" within the meaning of that section, the Defendants cannot claim the benefit of the exception, because a memorial of the impediment was not registered. If it was not an impediment, there is nothing to take the case out of the 1st section, which is an absolute bar to their claims. The original

(1) The principal sections of the *East Riding Registry Act* (6 Anne, c. 35), relied on in the argument were the following:—

Section 1. Whereas the lands in the East Riding of the county of *York*, and in the town and county of the town of *Kingston-upon-Hull*, are generally freehold, which may be so secretly transferred or conveyed from one person to another, that such as are ill disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons (who through many years' industry in their trades and employments, and by great frugality, have been enabled to purchase lands or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances, and not only themselves but their whole families thereby utterly ruined: Be it therefore enacted, &c., that a memorial of all deeds and conveyances, ... and of all wills and devises in writing . . . of, or concerning, and whereby any honors, manors, lands, tenements, or hereditaments in the said East Riding or in the said town and county of the town of *Kingston-upon-Hull* may be anyway affected in law or equity, may be registered in such manner as is hereinafter directed, and that every such deed or conveyance . . . shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered, as by the Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as hereinafter directed.

Section 10 prescribes that the memorial shall be in writing; and that in the case of wills the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors, or administrators, guardians, or trustees, attested by two witnesses.

Section 11 prescribes the form of the memorial.

Section 14: Provided also that all memorials of wills that shall be registered in manner as aforesaid within the space of six months after the death of every respective devisor, or testatrix

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West Riding Registry Act (1) contained a clause with a similar exception in favour of wills which had been prevented from being registered by a contest or other impediment; but in that clause there was no proviso that a memorial of the impediment should be registered. In the *East Riding Act* (which also amended the *West Riding Act*) the clause was introduced with this special proviso, which is a clear indication that it was the intention of the Legislature to increase the protection of titles.

With respect to the allegation of notice, no notice is proved; and the benefit of the registry is only taken away where there is actual notice, amounting to fraud: *Hine* v. *Dodd* (2); *Wyatt* v. *Barwell* (3).

Mr. *Karslake*, for *W. Atkin*, the heir-at-law.

Mr. *Cole*, Q.C., and Mr. *Ince*, for the Defendants the Appellants:—

We contend, first, that according to the true construction of the *East Riding Act* the registration of the will and codicil, which was effected within six months after they became known to the devisees, was sufficient. The clause in the 15th section, as to register-

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dying within the kingdom of *Great Britain*, or within the space of three years after the death of every respective devisor or testatrix dying upon or in any parts beyond the seas, shall be as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death of such respective devisor or testatrix, anything herein contained to the contrary thereof in any wise notwithstanding.

Section 15: Provided always that in case the devisee or person or persons interested in the honors, manors, lands, tenements, or hereditaments devised by any such will as aforesaid, by reason of the contesting such will, or other inevitable difficulty, without his, her, or their wilful neglect or default, shall be disabled to exhibit a memorial for the registry thereof within the respective times hereinbefore limited, and that a memorial shall be entered in the said office of such contest or other impediment within the space of six months after the decease of such devisor or testatrix who shall die within the kingdom of *Great Britain*, or within the space of three years next after the decease of such person who shall die upon or beyond the seas, then and in such case the registry of the memorial of such will within the space of six months next after his, her, or their attainment of such will or a probate thereof, or removal of the impediment whereby he, she, or they are disabled or hindered to exhibit such memorial, shall be a sufficient registry within the meaning of this Act, anything herein contained to the contrary thereof in any wise notwithstanding.

(1) 2 & 3 Anne, c. 4.
(2) 2 Atk. 275.
(3) 19 Ves. 435.

ing a memorial of the impediment, cannot be understood to apply to the concealment of a will, because it would be impossible for the devisees to register any memorial of such concealment before it came to their knowledge. In the *Middlesex Registry Act* (1), the 9th section is based upon the 15th section of the *East Riding Act*, but there is a special clause (sec. 10) introduced to provide for the case of a concealed will. No memorial is required, but a limit of five years is fixed, after which time the registration of such a will is ineffectual. A similar provision occurs in the *North Riding Registry Act* (2) where the period is three years. This shews that the intention of the Legislature was that where there was no limit of time, as in our Act, there should be no bar to the title of the devisee under a concealed will, if he brought himself under the 1st section by registering as soon as he was able to do so. The 1st section says: "in such manner as herein directed," and makes no mention of any time, but in the *Middlesex* and *North Riding Acts* before referred to, the words "at such time" are inserted in the corresponding sections.

Secondly, we contend that there is no distinct allegation of the heirship of *William Atkin;* there is no statement of the relationship, nor has the Plaintiff produced any evidence in support of the allegation. The Plaintiff therefore has shewn no title on his bill: *Baker* v. *Harwood* (3); *Holden* v. *Hearn* (4); *Marten* v. *Whichelo* (5).

The evidence shews that *William Atkin* had notice of the will and codicils; that he knew of the existence of some testamentary instrument is clear from his paying the legacies to some of the legatees under the last codicil. The Plaintiff has not got the legal estate, and is, therefore, affected by *William Atkin's* notice: *Ford* v. *White* (6).

Mr. *Kay*, in reply.

March 8. SIR G. J. TURNER, L.J.:—

The principal question in this case is, whether a mortgage of an

(1) 7 Anne, c. 20.
(2) 8 Geo. 2, c. 6.
(3) 7 Sim. 373.
(4) 1 Beav. 445.
(5) Cr. & P. 257.
(6) 16 Beav. 120.

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estate in the East Riding of the county of *York*, made by a person claiming to be the heir of a testatrix, and duly registered according to the provisions of the *East Riding Registry Act* has priority over, in effect whether it is valid and effectual against, the devisees of the estate under a will and codicil made by the testatrix, but which was not registered until many years after her death, nor until after the registration of the mortgage, and as to which no memorial of any contest or impediment disabling the registry thereof was at any time entered in the register. There are subordinate questions as to the heirship of the mortgagor, and as to the mortgagee having had notice of the will and codicil; but it will be convenient first to deal with the principal question without reference to the subordinate ones.

[His Lordship then stated the facts of the case as before mentioned, and referred to the proceedings in the cause and the decree of the Master of the Rolls, and continued:—]

The Defendant, *William Richard Prance*, and the other devisees have appealed from this decree. Three points have been insisted upon on the part of the Appellants in support of this appeal; first, that the will and codicil are valid and effectual against the Plaintiff, notwithstanding the provisions of the *East Riding Registry Act*, 6th Anne, c. 35; secondly, that it has not been proved that *William Atkin* was the heir of *Sarah Gooddy;* and, thirdly, that *William Atkin* had notice of the will and codicil, and that the Plaintiff is bound by that notice.

The first of these points depends upon the construction of the above-mentioned Act. Now the Act recites as follows. [His Lordship read the 1st section.]

It is clear, therefore, that wills were regarded by the Act as secret transfers and conveyances, and that the purpose of the Act was to prevent the titles of purchasers and mortgagees being defeated either by wills or by deeds which were not registered in the manner provided by the Act. This brings us to the question whether the will and codicil of *Sarah Gooddy* were or were not so registered. It was argued for the Appellants that they were, because the manner of registering pointed out by the 10th and 11th sections of the Act was, as it was said, observed,

and the 1st section of the Act does not, it was said, refer to the time, but only to the manner of registering. Then the 14th section of the Act provides as follows. [His Lordship read the section.]

This section, although, as was pointed out in the argument, expressed in the affirmative, that wills shall be valid if registered within the specified periods, seems to me to import a negative also, that they shall not be valid unless registered within those periods; a conclusion which there is less difficulty in arriving at, as this section clearly points, not merely to the 10th and 11th sections, but to the 1st section also; thus treating these three sections as one enactment; and if the 10th and 11th had been in terms, as they are in substance, embodied in the 1st section, it would, as it seems to me, have been clear that no case could, by the 14th section, have been taken out of the 1st section unless the registration was within the prescribed periods. The Appellants' case, therefore, upon the construction of the Act, if it can be maintained at all, must, as it seems to me, stand upon the 15th section. That section is in these terms. [His Lordship read the section.]

It was argued for the Appellants that the words "other inevitable difficulty" in this section must be construed to mean inevitable difficulty of such a nature as would admit of a memorial of it being entered on the register, and can have no reference, therefore, to the cases in which wills may not be forthcoming; but this argument does not seem to me to assist the Appellants' case, for if it be well founded, the consequence must be that the section will have no operation in such cases, and there would be nothing to limit the operation of the 1st section. Much was said in the course of the argument before us as to what ought to be considered as wilful negligence or default within the meaning of this 15th section, and also as to the meaning of the words "attainment of the will" contained in that section; but I do not think it necessary for us to give any opinion upon those points. It may be well, however, to observe that it would obviously be repugnant to the provisions of the Act to hold this 15th section to extend to cases of devisees knowing the contents of a will which was not forthcoming, and that the section makes no distinction between devisees

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who know and devisees who are ignorant of the contents of a will.

Reliance was placed, on the part of the Appellants, upon the case of suppression or concealment of a will not being referred to in this 15th section; but what has been already said as to the 1st section being left in operation in all cases which are not reached by the 15th section, meets this argument; and it may be added that the obvious purpose of the Act was to protect purchasers and mortgagees, and that the Legislature may well have thought that in the case of suppression or concealment it would be more just to leave the persons who might be injured by the suppression or concealment to any remedy which they might have against the person who had suppressed or concealed, than to throw that burden upon purchasers or mortgagees. So far, therefore, as this Act is concerned, it seems to me that the construction put upon it by the Master of the Rolls is correct.

With respect to the other Acts which were referred to in the course of the argument, I think that they are rather favourable than unfavourable to this construction. On referring to the *West Riding Act* (1), it will be seen that it is silent as to any memorial of any contest or impediment as to the registration of *Wills*, and that according to the provisions of it the titles of purchasers and mortgagees were liable to be defeated upon wills being registered within six months after (to use the expression of the Act) "the attainment of them;" and it may, I think, reasonably be supposed that the inconvenience arising from this state of circumstances led to the introduction into the *East Riding Act* of the provision requiring a memorial to be registered of any contest or other impediment to the registration of a will. And as to the *Middlesex Act* (2), and the *North Riding Act* (3), it is to be observed that they contain provisions that the titles of purchasers and mortgagees shall not, in case of concealment or suppression, be disturbed after the expiration of certain periods mentioned in the Act: in one case, five years; and in the other, three. After the lapse of these periods, devisees, however innocent they might be, were to be the sufferers; and if they were to be the sufferers after the expiration of the limited periods in cases in which periods were

(1) 2 & 3 Anne, c. 4. (2) 7 Anne, c. 20. (3) 8 Geo. 2, c. 6.

limited, I cannot see my way to hold that they were not to be the sufferers when no periods were limited. For these reasons, my opinion upon the construction of this Act accords with that of the Master of the Rolls.

Then as to the second point, the absence of proof that *William Atkin* was the heir of *Sarah Gooddy*. Upon looking into the evidence in the cause, I think there is sufficient to shew that he was recognised by the family as her heir, and in the absence of any express denial of the heirship, and of any evidence that there is any other person filling that character, I think there is sufficient to justify the inquiry directed by the decree upon this point.

There remains then the third point, the question of the Plaintiff being affected with notice of the will and codicil. It appears from the evidence on the part of the Defendants, that *William Atkin* was let into possession of the estate under an arrangement with *Richard Gooddy*, and that he agreed to pay to *Richard Gooddy*, during his life, a sum nearly equal to the income of the estate, and that during the pendency of this suit, there was found another codicil of *Sarah Gooddy*, dated 20th December, 1853; and which has been put in issue by supplemental answers of the Defendants *Ann McKee*, and of *William Richard Prance*. [His Lordship referred to the evidence on this subject and continued.] That the facts which are proved on the part of the Defendants raise a strong suspicion of notice, cannot be denied, but I think that they fall short of what is required to affect a registered title, for which purpose the notice must be clear and distinct, and amounting in fact to fraud: *Wyatt* v. *Barwell* (1).

Assuming, therefore, that the Plaintiff would be bound by notice to *William Atkin*, I do not think that there is sufficient to affect him; but I desire not to be understood as deciding that notice to *William Atkin* would affect the Plaintiff. I am by no means satisfied that it would. I see nothing in the statute to make the case of an equitable differ from that of a legal mortgagee with respect to the question of notice, and the principle which applies to the one case seems to me to apply equally to the other. With respect to the case of *Ford* v. *White* (2), which was so much relied upon on the part of the Appellants, I give no

(1) 19 Ves. 435. (2) 16 Beav. 120.

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opinion. It is sufficient to say that it is, as it seems to me, plainly distinguishable from the present case. In that case there was clear notice to the person who was upon the register; and the persons claiming under him, and who were held to be affected by the notice, do not appear to have been put upon the register at all. In this case the question is, whether there was such notice as would affect the person who is upon the register. Upon the whole case, my opinion is that the decree ought not to be disturbed, and that this appeal ought to be dismissed, and I think that it should be dismissed with costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

I have had considerable difficulty in this case, but after much reflection I am disposed to think that the opinion of the Master of the Rolls and of my learned Brother is the safer and better opinion, and I therefore concur in the decree.

Solicitors for the Plaintiff: Messrs. *Loftus & Young.*
Solicitors for the Defendants: Mr. *E. Doyle;* Mr. *F. W. Blake.*

HOPE *v.* CARNEGIE.

L. JJ. 1866 *Feb.* 22.

Foreign suit—Injunction—Real and personal estate.

A British subject, entitled to real and personal estate, both in *England* and in the *Netherlands*, died domiciled in *England*, leaving a will by which he gave to trustees, upon certain trusts, all his property here and abroad; but as to his foreign property so far only as he could dispose of it according to the law of the country where it was situate. A decree was made in *England* for the administration of his estate. Subsequently, one of his children instituted proceedings in the *Netherlands*, for the administration of both his real and personal estate in that country. *Stuart*, V.C., made an order restraining the prosecution of the pending proceedings in the *Netherlands*, and the taking any other proceedings there as to the personal estate.

On appeal from this order,

Held, by *Knight Bruce*, L.J., that the order ought not to have absolutely restrained the Appellant from carrying on the pending proceedings in the *Netherlands;* but ought to have left her at liberty to carry them on as to the real estate—if she could do so without proceeding as to the personal estate;

but *held* by *Turner*, L.J., that the order ought not to be thus varied, the Appellant not having shewn that the proceedings could be carried on as regarded the real estate alone.

Per TURNER, L.J.: Whether proceedings in the *Netherlands*, even as to the real estate only, ought not to be restrained—*Quære.*

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THIS was an appeal motion by the Defendant *Emily Mathilde Hope*, from an order of Vice-Chancellor *Stuart* granting an injunction.

Adrian John Hope, the father of the Defendant *E. M. Hope*, and of the Plaintiff, was a British subject entitled to real and personal estate in *England* and in the *Netherlands*. He died in 1863, leaving a will, by which he gave all his real and personal estate, English and foreign (but as regarded his foreign property, so far only as he had power to dispose of it according to the law of the country where it was situate), to trustees upon trust (subject to legacies to his daughters *Emily Mathilde Hope* and *Henrietta Hope*) for the Plaintiff upon his attaining twenty-one, with a gift to *E. M. Hope* and *Henrietta Hope*, equally, in the event of the Plaintiff dying under twenty-one.

On the 5th of November, 1864, a decree was made by the Court of Chancery, in a suit of *Hope* v. *Beresford Hope*, in which the present Plaintiff was the Plaintiff, and the trustees the Defendants, for carrying into execution the trusts of the testator's will, and the usual accounts and inquiries as to real and personal estate were directed.

After this decree the Defendant *Emily Mathilde Hope* commenced proceedings in the *Netherlands* for the administration of the real and personal estate of the testator situate in the *Netherlands*. She contended that the testator was at his death domiciled in the *Netherlands*, and that his will was, according to the law of that country, wholly or partially inoperative, both as to the real and personal estate.

The Plaintiff thereupon filed the present Bill against the testator's widow, the testator's other children, and the trustees of the will, praying to have it declared that the testator's domicil was English; that he did not die intestate as to any part of his property, English or foreign; that his real and personal property in the *Netherlands* was subject to the trusts of his will; and that the

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Defendants, other than the trustees of the will, might be restrained from intermeddling with the testator's estate, whether situate in *Great Britain* or the *Netherlands*, or elsewhere, and from taking or continuing any proceedings with reference thereto, and that the suit might be taken as supplemental to that of *Hope* v. *Beresford Hope*.

The Plaintiff moved, before Vice-Chancellor *Stuart*, for an injunction to restrain the proceedings in the *Netherlands*. His Honour, upon hearing the motion, considered it established by the evidence that the testator was domiciled in *England*, and held, therefore, that no proceedings in the *Netherlands* could be allowed as to the personal estate. His Honour considered that as to the real estate the Court could not interfere, but that inasmuch as the pending proceedings in the *Netherlands* related to personalty as well as realty, they ought to be restrained altogether. His Honour accordingly granted an injunction restraining the Defendant *Emily Mathilde Hope* from continuing the pending proceedings in the *Netherlands*, and from commencing any other proceedings in respect of the testator's personal estate in the *Netherlands* or elsewhere, and from intermeddling with such personal estate.

The Defendant *Emily Mathilde Hope* appealed from this order.

Mr. *Swanston*, for the Appellant:—

There is a *bonâ fide* question as to domicil which the Court will not decide on this interlocutory application, and an injunction, therefore, ought not to have been granted even as regards personal estate. As regards real estate in the *Netherlands*, there is no jurisdiction to restrain proceedings in the Courts there with relation to it, for the real estate must be governed by the law of that country. We ought not, then, to be restrained from carrying on the pending proceedings as to the real estate. This Court often will not stop pending proceedings, where, if applied to in time, it would have prevented their institution. If it is ultimately established that the testator was domiciled in *England*, his personal estate will, of course, have to be distributed according to English law, but until that point—which cannot be decided now—has been decided, why should the Court stop proceedings which are being carried on in the country where the property is?

The *Attorney-General* (Sir *R. Palmer*), Mr. *Malins*, Q.C., and Mr. *Hemming*, for the Plaintiff:—

The only foreign real estate is a property in *Holland*, which is a trifling part of the testator's whole property. The question arises, whether, according to the law of *Holland*, the testator was able to devise the whole or only a fourth,—a question which must be decided for the purpose of the decree here. Proceedings in *Holland*, even if they related to the real estate alone, ought, therefore, to be restrained, as in *Bunbury* v. *Bunbury* (1), upon the Plaintiff giving the same undertaking as was required in that case. But in any event, we submit that the Vice-Chancellor was right in staying the pending proceedings, for they relate to the personal as well as the real estate, and there is not a suggestion upon the evidence that, according to the course of procedure in that country, they can be continued as to the real estate alone.

Mr. *Swanston*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

My impression is, that the order of the Vice-Chancellor ought to stand, except so far as it restrains the proceedings as to the landed property in the *Netherlands*. It may or it may not be possible to proceed as to the landed property in the *Netherlands* without proceeding as to the personal estate; that must depend on the course of law in the *Netherlands*. Whatever may be the effect of this Court declining to prohibit proceedings as to the landed estate in the *Netherlands*, my impression is that it ought so to decline, and that the Appellant here should be at liberty, if she can do so according to the law of that country, to proceed there as she may be advised concerning the landed estate situate there. Subject to that, I think that the order is substantially right. My opinion, however, so far as it is adverse to the order, is of no importance, because, as I understand from my learned Brother, he is of opinion that in the special circumstances of the case the order should stand even to the extent of restraining proceedings concerning the landed estate in the *Netherlands*. The opinion of one of us alone would not affect the order, consequently, if I under-

(1) 1 Beav. 318.

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stand, which I believe myself to do, my learned Brother's opinion rightly, the whole order will stand, although I dissent from a portion of it.

SIR G. J. TURNER, L.J. :—

I think that the whole of the order must stand, including that part of it which restrains proceedings in the suit instituted in the *Netherlands*, both as to the landed estate and as to the personal estate, because in my opinion it rests upon the party making this motion to shew that she can, in the suit which has been instituted in the *Netherlands*, carry on the proceedings as to the landed estate without proceeding as to the personal estate. I go no further than that, because it is unnecessary to go further on the present motion. If the Appellant had come here upon evidence satisfying the Court that the existing proceedings in the *Netherlands* could be carried on as to the landed estate there without interfering with the personal estate, another and a different question would have arisen. I do not enter into that question, for it is not before us on the present occasion, since we cannot, upon this application, extend adversely to the Appellant the order which the Vice-Chancellor has made, so as to restrain proceedings in the *Netherlands* in respect to the real estate alone. I am not at all sure how the case might ultimately stand if an application for that purpose were brought before us; because this Court, according to my view of the case, must necessarily, in administering the testator's estate, try the question as to his real estate in the *Netherlands*, and ascertain for itself what the law of the *Netherlands* is with reference to the questions, whether the testator had power to devise that estate, and whether, if he had not power to devise the whole estate, he had not at least power to devise one-fourth of it upon the trusts of his will, so making it liable to be dealt with in this suit as supplemental to the suit instituted for the administration of the estate. That brings the case very close upon *Bunbury* v. *Bunbury* (1), in which Lord *Langdale* restrained proceedings in a colony as to property situate there, taking the undertaking of the party who applied to the Court for its intervention to be bound by any order which this Court might after-

(1) 1 Beav. 318.

wards make with respect to those proceedings, so that this Court might be enabled to make use of those proceedings for the purpose of determining a question which this Court was compelled to determine, whether the estate did or did not pass. It appears to me that the whole matter had better be treated in this Court. If the Appellant objects to that course, I think that we cannot alter the order adversely to her on the present occasion, but can only refuse to alter it in the way proposed by her.

Solicitors for the Plaintiff: Messrs. *Young & Jackson.*
Solicitor for the Defendant: Mr. *Abrahams.*

In re JOHNSON.

STEELE *v.* COBHAM.

Practice—Receiver—Bankruptcy—Defect of Parties.

After an order had been made on summons for the administration of the real and personal estate of a testatrix, the sole executor and trustee became bankrupt:—

Held (reversing the decision of the Master of the Rolls), that a receiver ought to be appointed, and that the fact of the assignees not being before the Court was not a sufficient reason for refusing to appoint one.

THIS was a motion by the Plaintiff by way of appeal from a decision of the Master of the Rolls refusing to appoint a receiver.

On the 10th of May, 1865, an order was made on summons for the administration of the real and personal estate of *Phœbe Johnson,* at the suit of a creditor. The Defendant, *Cobham,* was the sole trustee and executor, and the sole Defendant, the real estate being devised to him in trust for sale.

On the 18th of January, 1866, the Defendant was adjudged bankrupt on his own Petition, and on the 6th of February creditors' assignees were appointed. On the 28th of February an adjourned summons, which had been taken out for the 3rd of February, for the appointment of a receiver, was disposed of by the Master of the Rolls personally in Chambers, when His Lordship refused to appoint a receiver, on the ground that the assignees were not parties to the suit. On the 3rd of March the Plaintiff

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pro formâ moved in Court, before the Master of the Rolls, to the same effect, and the motion having been refused, the Plaintiff appealed.

Mr. *Selwyn*, Q.C., and Mr. *Nalder*, for the appeal motion:—

The bankruptcy of a trustee is a ground for appointing a receiver: *Langley* v. *Hawk* (1); *Scott* v. *Becher* (2). There is no one to protect the assets, and a defect of parties is not a sufficient ground for refusing the application: *Evans* v. *Coventry* (3). It does not appear that the assignees were before the Court in either of the cases cited.

Mr. *Southgate*, Q.C., and Mr. *W. Barber*, for the bankrupt, supported the decision appealed from.

SIR J. L. KNIGHT BRUCE, L.J.:—

This appears to me a case in which the appointment of a receiver is desirable for the protection of the estate, and I do not see any substantial reason why the appointment should not be made.

SIR G. J. TURNER, L.J.:—

I also am of opinion that a receiver ought to be appointed. The sole executor and trustee having become bankrupt, and his assignees having no power to interfere with the trust estate, there is no person to take care of it in whom the Court can place confidence. Under such circumstances it is proper to appoint a receiver, and the absence of the assignees is no sufficient reason why the Court should decline to interfere for the protection of the property, although I do not see how the suit can be effectually prosecuted without their being brought before the Court.

MINUTES:—Order for the appointment of a receiver, the Plaintiff to serve the assignees with notice of the order for administration, and of the order for the appointment of a receiver, and of all proceedings under the latter order.

Solicitors for the Plaintiff: Messrs. *Steele & Son.*
Solicitor for the Defendant: Mr. *T. Southgate.*

(1) 5 Madd. 46. (2) 4 Price, 346. (3) 5 D. M. & G. 911.

PAYNE *v.* PARKER.

L. JJ.
1866
March 15.

Practice—Parties—Trustee—Cestui que trust—15 & 16 *Vict. c.* 86, *s.* 42, *rule* 9.

One of the *cestuis que trust* under a deed of family arrangement made a settlement of his share. There were two trustees of the settlement, one of whom was also a trustee of the deed of arrangement. In a suit to administer the trusts of the deed of arrangement, and make the trustees of it responsible for breaches of trust:—

Held, that since one of the trustees of the settlement was an accounting party as a trustee of the deed of arrangement, the *cestuis que trust* under the settlement ought to be made parties.

THIS was a suit to carry into effect the trusts of articles dated the 26th of July, 1842, made previously to the marriage of *Edward Payne* the younger, since deceased, of which the Defendants, *John Parker* and *J. C. Williams* were the trustees, and also of the deed of arrangement next hereinafter mentioned.

By a deed of family arrangement dated the 24th of March, 1849, relating to the property of *Edward Payne* the elder, who had made a will containing dispositions in favour of his two sons, *John Payne* and the above-named *Edward Payne*, certain sums were vested in *John Parker*, *J. C. Williams*, and *Rupert Clarke*, upon trust (subject to a life annuity to *Mary Payne*, since deceased), as to one moiety for *John Payne*, and as to the other moiety, to transfer it to the trustees of the will of *E. Payne* the younger. By this will the property of *E. Payne* the younger was bequeathed to *Parker* and *Williams*, on the trusts of the settlement.

By a settlement dated the 23rd of May, 1849, previous to the marriage of *John Payne*, his share under the above deed of arrangement was assigned to *E. Heninghem* and the above-named *Rupert Clarke*, upon trusts for the husband and wife and the children of the marriage. There was not, however, any child.

The present bill was filed by the only surviving child of *Edward Payne* the younger, to carry into effect the trusts of the articles and of the deed of arrangement, and to compel the trustees of the deed of arrangement to make good certain breaches of trust. The only Defendants were *Parker*, *Williams*, *Rupert Clarke*, *Heninghem*, the

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widow of *Edward Clarke* the younger, with her second husband and the trustees of the settlement made on her second marriage, and *John Payne* who was out of the jurisdiction. In consequence of *Rupert Clarke's* filling two distinct characters, he and *Heninghem* appeared by different solicitors and were represented by different counsel.

A decree having been made, one of the questions on the present appeal was whether the suit was not defective for want of parties, no *cestui que trust* under the settlement of the 23rd of May, 1849, being before the Court.

Mr. *Willcock*, Q.C., and Mr. *Prendergast*, for the Plaintiff:—

The trustees of the settlement of the 23rd of May, 1849, are before the Court, and they sufficiently represent the *cestuis que trust*: 15 & 16 Vict. c. 86, s. 42, rule 9.

Mr. *G. M. Giffard*, Q.C., and Mr. *F. T. White*, for the trustees of the deed of arrangement:—

The Court will require Mrs. *Payne* to be before the Court. One of the trustees of her settlement being also an accounting party in this suit, the trustees of that settlement cannot properly represent the *cestuis que trust*. If she is not here we shall be exposed to a fresh suit by her.

Mr. *Crouch*, for the Defendant *Heninghem*.

Mr. *Willcock*, in reply:—

The other trustee, *Heninghem*, is perfectly independent, and appears by separate solicitor and counsel. There is therefore no reason for requiring the presence of the *cestuis que trust* under the settlement.

SIR G. J. TURNER, L.J.:—

The parties to the settlement of the 23rd of May, 1849, intended their interests to be protected by two trustees. One of those trustees being an accounting party as a trustee of the deed of arrangement, has an interest adverse to that of his *cestuis que trust*

under the settlement. Under these circumstances I think that we ought to require the *cestuis que trust* to be made parties.

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SIR J. L. KNIGHT BRUCE, L.J., concurred.

The appeal was accordingly ordered to stand over, leave being given to amend the bill for the purpose of bringing Mrs. *Payne* before the Court.

Solicitors for the Plaintiff: Messrs. *Brundrett, Martin, & Randall.*
Solicitor for the Defendant *Clarke:* Mr. *A. G. Holmes.*
Solicitor for the Defendant *Heninghem:* Mr. *Henry Fryer.*
Solicitor for the Defendant *Parker:* Mr. *John Letts.*

In re LONDON INDIARUBBER COMPANY.

L. C. and L. JJ.
1866
March 6, 21.

Company—Voluntary Winding-up—Re-registering—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 176, 180, 199.

A company registered under the former *Joint-Stock Companies Acts*, may be wound up voluntarily under the supervision of the Court without being re-registered under the Act of 1862.

THE London Indiarubber Company, Limited, was incorporated and registered on the 4th of October, 1860, under the *Joint-Stock Companies Acts*, 1856, 1857, and 1858. The company was unsuccessful, and meetings were duly held, at which resolutions were passed that the company should be wound up voluntarily, and that a Petition should be presented for winding it up under the supervision of the Court, and praying accordingly. The Petition was set down before the Vice-Chancellor *Kindersley*, who said that he felt a difficulty on account of the observations of Lord *Westbury* in the case of *Bowes* v. *Hope Insurance Society* (1), which appeared to be contrary to the case of the *Torquay Bath Company* (2), the question being whether it was necessary for a company to be re-registered under the *Companies Act*, 1862, in

(1) 11 Jur. (N. S.) 643.
(2) 32 Beav. 581; 9 Jur. (N. S.) 633.

1 C. and I. J. J. 1866. In re London India-rubber Company.

order to be wound up voluntarily under the supervision of the Court, and he declined to make the order. The Petition was accordingly taken before the Lords Justices, who wished it to be heard before the Lord Chancellor, and on the 6th of March it came before the full Court.

Mr. *Westlake*, for the Petitioners:—

The question is, whether this company is a registered company within section 199 of the Act of 1862, so as to be capable of being voluntarily wound up, or whether it was necessary to re-register the company on account of the terms of the 176th section; in fact, whether Part viii. of the Act repealed Part vi. The very case came before the Master of the Rolls in the case of the *Torquay Bank Company*, and he decided that re-registration was not necessary: and accordingly the registrar has refused to re-register such companies; but then came the case of *Evans* v. *Hope Insurance Society*, which was considered to overrule the *Torquay Bank Company's Case*, and threw doubt upon the matter.

Mr. *Bardswell*, for the Official Liquidator.

March 21. Lord Cranworth, L.C., now delivered the Judgment of the Court:—

There are great difficulties in construing this Act, and the different clauses cannot perhaps be reconciled, but on the whole we think it safest to look at the 176th section, which says that "subject as hereinafter mentioned," this Act shall apply to companies formed and registered like this company under the Act of 1856. But then the difficulty is to find what these words, "subject as hereinafter mentioned," apply to. There are certainly some scattered provisions to which they may apply, and so construing the clause, it may for the present purpose be taken as an absolute declaration that this Act shall apply to companies formed and registered under the former Acts. If that is so, there is no necessity to re-register under the power given in the 180th section, and then it would not be reasonable to hold that such a company is afterwards included under the designation of unregistered com-

panies. I cannot say that this solution is altogether satisfactory, but it seems to us the most reasonable.

The interpretation therefore will be, that the company having been formed and registered under the former Acts, is, under the 176th section, to be deemed to be registered under this Act, and consequently capable of being wound up voluntarily.

The case of *Bowes* v. *Hope Insurance Society* (1) has nothing to do with this case. The winding up there was not voluntary, but was obtained by a judgment creditor; he was the only creditor, and the company denied the validity of his debt, and the Lords Justices gave him time to establish it. The House of Lords, on appeal, altered this order, and directed that the winding-up order should be good unless, within a limited time, the company filed a bill and impeached the debt, but that has no bearing whatever upon the present question.

The order for a voluntary winding-up under the supervision of the Court will be made as prayed.

Solicitors for Petitioners and Official Liquidator: Messrs. *Sole, Turner, & Turner.*

In re LEIGHTON AND BENETT.

Bankruptcy—Witness—Production—Costs—Bankruptcy Act, 1849 (12 & 13 *Vict.*, *cap.* 106) *ss.* 100, 260.

On the hearing of a Petition for adjudication of bankruptcy, a clerk of the persons against whom the adjudication was prayed, who stated that he had no possession of their books:—

Held, not bound to produce them.

Where an order of a Commissioner is discharged on appeal, the costs of the appeal may be given to the Appellant.

THIS was an appeal from an order of Mr. Commissioner *Holroyd*, ordering *R. H. Byrne* to produce certain account books.

The petitioning creditor in this case was the public officer of the *Birmingham & Midland Banking Company*, and the Petition

(1) 11 Jur. (N. S.) 643.

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prayed an adjudication in bankruptcy against *Henry Leighton* and *P. H. Benett*, trading as *Leighton & Co.* *Leighton* and *Benett* had been partners in trade in *China*, and Mr. *Leighton* remained in *China*. Mr. *Benett* came to *England* and took a place of business in *Mark Lane*, where a business of *Leighton & Co.* was carried on, but there was a dispute as to whether Mr. *Leighton* was a partner. The Petition for adjudication was filed, and *R. H. Byrne* was summoned to appear at the hearing on the 6th of March as a witness, and to bring with him all books and papers relating to the business of *H. Leighton* and *P. H. Benett*. At the hearing Mr. *Byrne* refused to produce the books, stating that he was merely a clerk employed to make entries in the books, and that the books were not his or in his custody, and that he had no right to remove them from the office. The petitioning creditor deposed that he had not been able to find Mr. *Benett* or to serve him. The Commissioner thereupon made an order upon *R. H. Byrne* to produce the books. *R. H. Byrne* now moved to discharge that order.

Mr. *De Gex*, Q.C., and Mr. *R. Griffiths*, for the witness, contended that he was only a clerk, and had no authority to produce the books: *Falmouth* v. *Moss* (1); *Reid* v. *Langlois* (2); *King of Two Sicilies* v. *Willcox* (3). The creditor had no right to look at the books in order to try and fish out an act of bankruptcy.

Mr. *Bacon*, Q.C., and Mr. *Reed*, for the petitioning creditor, said that the cases cited were at law merely, but these proceedings were regulated by sec. 100 and sec. 260 of the Bankruptcy Act of 1849, which gave the Commissioner much more extensive powers of compelling evidence. No right of property was to be considered, and the only question was whether the documents were in the possession or power of the witness. One bankrupt was in *China*, and the other could not be found: if they could be found and would not produce the books, they would be imprisoned. This was an obvious and easy mode of evading the provisions of the bankruptcy laws. The debt was undoubted, and they ought not to be stopped in that manner.

(1) 11 Price, 455. (2) 1 Mac. & G. 627.
(3) 1 Sim. (N. S.) 301, 319; 15 Jur. 214.

Mr. *De Gex*, in reply.

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LORD CRANWORTH, L.C.:—

I do not think that the special terms of this Act of Parliament make any difference in the question whether these books are or are not to be produced, and I should be going to a great length if I held that they were. If these persons had gone away, and left their books in the sole possession of this clerk, it might be argued that he was, under the bankrupt law, liable to produce them. But he says that they are not in his possession at all; that he has only to make entries, and has nothing to do with them besides. I might be exposing him to an action; and I do not know by what authority I can order a person whom *Leighton & Benett* employ as a clerk to produce their books. I think that the order of the Commissioner is wrong, and must be discharged. The witness must have his costs.

The minutes, as prepared by the Registrar, provided that the order of the Commissioner should be discharged with costs, and the matter was thereupon mentioned to the Lord Chancellor as on the minutes.

May 5. Mr. *Bacon*, for the Petitioner:—

The rule is, that where an order of a Court is discharged by a Court of Appeal no costs are given of the appeal on either side. Here the order appealed against was not made at the instance of either party but by the Commissioner himself, and your Lordship was only asked to say whether the Commissioner was right.

Mr. *De Gex*, for the witness:—

This is, in fact, a rehearing on the question of costs. There is no such rule as that supposed as to the order of a Commissioner in Bankruptcy, and the Court has always a discretion.

[*Baring* v. *Harris* (1), *Ex parte Taylor* (2), *Ex parte Cole* (3), were cited.]

Mr. *Bacon*, in reply, said that the cases cited were those in

(1) 12 L. T. (N.S.) 218. (2) 3 De G. & J. 480. (3) 11 W. R. 127.

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which the claim was declared unfounded, and the Court thought that the applicant ought to pay all the costs.

The LORD CHANCELLOR said that his opinion remained the same, that the Commissioner's order was wrong, and ought to be discharged, and that the witness ought to have his costs of the appeal; as to his costs before the Commissioner, he must get them from the party who summoned him. He must also have his costs of this application, as the Registrar's notes were clear, and this application was to have them varied.

Solicitors for the Petitioners: Messrs. *Courtenay & Croome.*
Solicitors for the Witness: Messrs. *Beale, Marigold, & Beale.*

L. C. 1866 *Jan.* 23; *April* 12.

In re MARKS.

Bankrupt—Cumulative sentence—Debts without expectation of payment—Bankruptcy Act, 1861 (24 & 25 *Vict.*, *cap.* 134), *s.* 159.

The Court can only inflict on a bankrupt one of the penalties specified in section 159 of the *Bankruptcy Act*, 1861.

Under the circumstances a bankrupt was not considered to have contracted a debt without any reasonable or probable ground of being able to pay the same, though he obtained goods on credit whilst insolvent, and soon afterwards sold them for less than their cost price.

THE bankrupt in this case was a dealer in shoes at *Birmingham*. By an order of the Commissioner, the bankrupt had been sentenced to imprisonment for six months, and to have his order of discharge suspended for a year, under section 159 of the *Bankruptcy Act* of 1861, for omitting to keep proper books of account, and contracting debts without any reasonable or probable ground of expectation of being able to pay the same.

The bankrupt appealed.

It appeared from the accounts furnished and from the examination of the bankrupt that he could read and write but imperfectly, and that in 1864 his estate was insolvent by £197. In January, 1865, he went to Messrs. *Marshall*, dealers in boots and shoes, and

obtained goods to the amount of £22, representing himself to be able to pay twenty shillings in the pound. In February, 1865, being then ill in bed, he sold these goods by auction for £7 17*s.* Between September, 1864, and March, 1865, he had goods to the amount of £673, and sold goods to the amount of £520, at little or no profit. In March, being pressed for money, he became bankrupt. His debts were then £741, and there appeared to be no available assets.

Mr. *De Gex*, Q.C., and Mr. *Sargood*, for the bankrupt, contended that at all events the order of the Commissioner was wrong, as he could not pass a cumulative sentence.

Mr. *Little*, for the assignee, supported the order of the Commissioner.

Jan. 23. LORD CRANWORTH, L.C., said that the Court was tender of the liberty of the subject, and that any enactment dealing with it must be construed strictly. Here the enactment was that the Commissioners might, under certain circumstances, either refuse an order of discharge, or suspend it, or grant it subject to conditions, or sentence the bankrupt to be imprisoned for any period not exceeding a year, but this did not include power to suspend the order of discharge *and* imprison. The Commissioner might do either, but could not do both, and the order could not stand.

After some discussion whether the matter should be sent back to the Commissioner, His Lordship decided to hear it, and make such order as might be proper under the circumstances, and adjourned the hearing.

April 12. The appeal now came on for argument.

Mr. *De Gex*, and Mr. *Sargood*, for the bankrupt, contended that this debt had not been contracted without any reasonable or

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probable ground of expectation of being able to pay the same. The only thing shewn was that, according to the accounts, there was a deficiency in 1864, and that the goods were sold at a sacrifice; but it did not follow that when he bought the goods he did not expect to pay for them, or intended to sell them at a loss.

Mr. *Little*, for the assignees, contended that the order of discharge ought to have been absolutely refused. There were no accounts—though that was not relied upon, as the bankrupt could not read or write well; but he made a false representation to the creditor, and never could have intended to pay for the goods: *Ex parte Barker* (1).

Mr. *De Gex*, in reply.

LORD CRANWORTH, L.C:—

I should be rather glad to be able to affirm this order, because I think that this man has behaved very badly, but I cannot find that he has brought himself under the 159th section of the Act of 1861. That section says that, if the bankrupt shall not be accused of acts amounting to misdemeanour, then the Court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted. I am happy to say that, as the law now stands, the Court is no longer to enter into the general consideration of the conduct of the bankrupt, but is only to consider it under the five heads, one of which is, whether the bankrupt could not have had, at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same, and then it says that the Court may either refuse an order of discharge, or may suspend the same from taking effect, for such time as the Court may think fit, and so on: that is to say, looking at his conduct as to these five heads of offence, the Court may punish him, but only if one of these offences is proved against him. Now, the only offence relied upon as proved is, that at the time when some of his debts were contracted, the bankrupt could

(1) 33 L. J. (Bky.) 13.

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not have had any reasonable or probable ground of expectation of being able to pay the same, and this, in my opinion, has not only not been proved, but he might well have had means of paying the debt in question. He had been for some time going on very badly and recklessly; but I see nothing to lead me to suppose that he might not think that he should sell these goods so as to be able to pay for them. He has, no doubt, been dealing in a very improper manner, and has misled Mr. *Marshall* and others, by stating that he could pay twenty shillings in the pound, but I cannot decide from that that he had no expectation of paying this debt. He has been going on very badly and recklessly, but I cannot see that he has committed any of the five offences mentioned in the 159th section. I must discharge the order: the bankrupt will have his costs of this appeal, but not those of appearing before the Commissioner.

Solicitor for the Bankrupt: Mr. *G. Malim.*
Solicitors for the Assignees: Messrs. *Church & Sons.*

Ex parte MEE.

L. C. 1866 *April* 12.

Bankruptcy—Debts without expectation of payment—Bankruptcy Act, 1861 (24 & 25 *Vict., cap.* 134) *s.* 159.

A bill accepted for the accommodation of another person may in bankruptcy constitute a debt contracted without any reasonable or probable ground of expectation of being able to pay the same.

JOHN MEE, the bankrupt in this case, was a farmer, and in 1864 had stock-in-trade of the value of £859, but owed £500 to the trustees of his wife's settlement. He then began to accept bills for the accommodation of one *Mellor,* his wife's brother, who afterwards became bankrupt. These bills had been renewed from time to time, and at the time when *Mee* was himself made bankrupt, he was liable for £1380 on these bills. He had sold off his farming-stock in order to pay the trustees of his wife's settlement, and at the time of his bankruptcy in November, 1865, he still owed them £105; his other debts were under £100, and the

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property given up to the assignees was valued by him at £302. Under these circumstances, the creditors' assignee, and two of the holders of the bills, opposed his discharge on several grounds, and the Commissioners suspended the order of discharge for twelve months and refused protection to the bankrupt, as having contracted debts without any reasonable or probable ground of expectation of being able to pay the same.

The bankrupt appealed.

Mr. *Horton Smith* for the bankrupt, contended that the liabilities on the accommodation bills were not debts at all within the meaning of the statute, for he never expected to incur any liability at all on them.

Mr. *Little*, for the assignee and creditors, opposed, and cited *Ex parte Barker* (1).

Mr. *Horton Smith*, in reply:—

This is a penal statute and must be construed strictly. The case is distinguishable from *Ex parte Barker*, as these bills were never sent into the market or negotiated, but were only renewed from time to time.

Lord Cranworth, L.C.:—

The only question is, whether or not the bankrupt, by accepting bills which he knew at the time when he accepted them he had no reasonable expectation of being able to pay, did not contract debts within the meaning of the 159th section of the *Bankruptcy Act*, 1861. I think he did. If a person accepts a bill for the accommodation of another, he contracts a debt, though he may think the other solvent, and I see no means of distinguishing this case from that before *Lord Westbury*, and I think that his lordship's construction of the language of the statute is very convenient for the interests of the community. The appeal will be dismissed with costs.

Solicitors for the Assignee: Messrs. *Reed & Phelps.*
Solicitor for the Bankrupt: Mr. *Hunt.*

(1) 33 L. J. (Bky.) 13.

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L. JJ.
1866
Feb. 9, 10, 23; March 24.

Company—Voluntary Winding up—Amalgamation—Liberty to sue in name of the Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161, 147, 138, 165.

At a general meeting of the shareholders of a banking company resolutions were passed for the voluntary winding-up of the company, and appointment of liquidators, and for confirming an agreement for the amalgamation of the company with the *Bank of H.*, upon certain terms therein specified. The liquidators proceeded to wind up the company upon the footing of the amalgamation, and in conformity with the 161st section of the *Companies Act*, 1862. Two dissentient shareholders, who were abroad at the time of the meeting, presented a Petition impeaching the amalgamation on the ground of the insufficiency of the notice convening the meeting, and for other reasons; and praying, 1, that the company might be wound up by an order of the Court; 2, that if not, the voluntary winding up might be continued under the supervision of the Court; 3, that the rights of the Petitioners as against their co-contributories and the liquidators might be declared; or, 4, that they might be at liberty to use the names of the company and the liquidators in any proceedings they might be advised to take in reference to the winding up:—

Order of the Master of the Rolls dismissing the Petition discharged, and *Held*, first, that in the absence of any distinct allegations in the Petition of misconduct on the part of the liquidators, the Court would make no order for continuing the voluntary winding up under the supervision of the Court: Secondly, that inasmuch as the voluntary winding up and the amalgamation were all one transaction, and the amalgamation could not be impeached in that jurisdiction, and in the absence of the *Bank of H.*, the Petition must stand over to permit the Petitioners to take proceedings to set aside the amalgamation; and thirdly, that the Petitioners might be at liberty to use the names of the company and the liquidators in such proceedings, on giving an undertaking to abide by such order as to costs as this Court might make.

THIS was an appeal from an order made by the Master of the Rolls, on a Petition presented by *James Brooksbank Higgs* and *Robert Montgomery Martin*, shareholders in the *Imperial Bank of China, India, & Japan, Limited*, under the following circumstances:—

The company was established under the *Companies Act*, 1862, and registered as a limited company, on the 22nd of April, 1864. Its object was the transaction of banking business in this

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country, and in the East and elsewhere. Its nominal capital was £2,000,000, divided into forty thousand shares of £50 each, of which twenty thousand only were issued. The company never carried on any business. By its articles of association (art. 62), power was given to the directors "to amalgamate with any other company carrying on business within any of the objects of the company, or with any bank or financial or exchange business, and to pay for any property or rights acquired by the company, in money or shares, or partly in one mode and partly in the other, and to attach to any shares given by way of purchase-money, such privileges or priorities over the other shares of the company as might be agreed upon."

In July, 1864, there was a negotiation between the company and another company established for similar objects, called *The Bank of Hindustan, China, & Japan,* for the amalgamation of the two companies, and on the 28th of July, 1864, the directors of the *Imperial Bank* issued a circular to their shareholders, announcing that the negotiations for the amalgamation of that bank with the *Bank of Hindustan* had been brought to a successful issue, and that an extraordinary general meeting of each company would, as early as practicable, be convened to confirm the arrangements which had been made.

On the 10th of August, 1864, another circular was issued by the directors of the *Imperial Bank* to their shareholders, giving notice that an extraordinary general meeting of the shareholders would be held at the *London Tavern, Bishopsgate Street,* on Monday, the 25th of August, at twelve o'clock, when the agreement entered into with the *Bank of Hindustan, China, & Japan,* would be submitted for approval, and resolutions to voluntarily wind up the bank, and appoint liquidators, would be proposed. The circular then set forth the terms of amalgamation, which were stated to be in substance as follows:—

"1st. 20,000 new shares of £100 each, of the *Bank of Hindustan,* to be issued to the holders of the 20,000 shares in the *Imperial Bank.*

"2nd. Such shares to be issued at £6 per share premium.

"3rd. Five pounds per share of the premium to be placed to the

reserve fund of the united bank, in addition to the amount already at the reserve of the *Bank of Hindustan;* and also all further additions by which the total reserve fund at the end of this year will, with the profits, probably amount to about £160,000.

"4th. The remaining £1 per share of the premium will be applied to pay off preliminary expenses.

"5th. A dividend of £10 per cent. per annum, free of income tax, from the time the bank has been in operation, to be paid to the shareholders of this bank on exchanging certificates.

"6th. Four directors from this bank to be nominated by and join the board of the *Bank of Hindustan.*

"7th. The new shares now to be issued as above, to rank on equal terms with all the previous issues of the *Bank of Hindustan,* whether original or otherwise.

"8th. The option of paying up to £25 per share under discount at £6 per cent. per annum is also reserved to the shareholders."

This meeting was accordingly held, and the following resolutions were passed at it:—

"1st. That an agreement dated the 24th day of August, 1864, and made between the *Bank of Hindustan,* of the one part, and this company of the other part, having been read and submitted to this meeting, this company do hereby approve of the same, and do authorize the directors to affix the seal of the company thereto.

"2nd. That the company be wound up voluntarily.

"3rd. That the Honourable *James Frederick Stuart Wortley, Richard Cook Coles,* Esq., *Joseph Mackrill Smith,* Esq., and *Henry Turner,* Esq., be appointed liquidators for the purpose of winding up the affairs of this company and distributing the property. And that the liquidators be authorized to receive, in compensation or part compensation for the business and property of this company, shares in the *Bank of Hindustan,* upon the terms specified in the above-mentioned agreement; and if any member shall express his dissent from this resolution, by a notice in writing to the liquidators, not later than seven days after the meeting at which this resolution is passed, and shall require the liquidators to purchase the interest of such dissentient member, the liquidators shall raise

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the purchase-money to be paid to such dissentient member by the sale of the share or shares in the *Bank of Hindustan*, which, under the terms of the said agreement, would have been allotted to such dissentient member."

No notice was given in the circular of the 10th August calling the meeting, of so much of the last resolution as was framed with reference to the 161st section of the *Companies Act*, 1862 (1).

The agreement referred to in the foregoing resolutions was dated the 24th of August, 1864, and contained the terms of amalgamation set out in the notice of the 10th of August.

(1) This section is as follows:—

"Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things, as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: No special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

Before its execution it had been approved by the Directors of the *Bank of Hindustan*, and they had passed the following resolution: "That, with a view to carry the same agreement into effect, the capital of the said *Bank of Hindustan* be increased from £2,000,000 to £4,000,000 sterling, by the creation of 20,000 new shares of £100 each, and that they be issued to the holders of the shares in the *Imperial Bank* pursuant to the terms stated in the said agreement."

On the 30th August, 1864, a further circular was issued by the directors of the *Imperial Bank* to their shareholders, giving notice that another extraordinary general meeting would be held on the 12th September, to confirm the resolutions of the 25th August. This meeting was held accordingly and at it the foregoing resolutions were confirmed.

In pursuance of the agreement the assets of the *Imperial Bank* were handed over by the liquidators to the *Bank of Hindustan*, and the great majority of the shareholders in the *Imperial Bank* became shareholders in the *Bank of Hindustan* upon the terms prescribed by the agreement. Some of the shareholders, however, repudiated the agreement and refused to become shareholders in the *Bank of Hindustan* upon the terms prescribed by it. It was at first insisted on the part of the *Bank of Hindustan* that these dissentient shareholders were bound by the agreement and had become shareholders in that bank, but ultimately, upon application to the Court of Chancery, several of these dissentient shareholders, among others the present Petitioners, procured their names to be struck out from the register of shareholders of the *Bank of Hindustan* (1).

At the times when the resolutions of the shareholders of the *Imperial Bank* of the 25th of August and the 12th of September were passed, these Petitioners were absent from this country, and they did not return until some time after those resolutions had been passed, although one of them appeared to have been in this country when the intended amalgamation was first announced in the month of July, 1864. The Petitioners subsequently presented the present Petition to the Master of the Rolls, complaining that

(1) See *Los' Case*, 13 W. R. 883; 12 L. T. (N. S.) 690; *Higgs' Case*, 2 H. & M. 657; *Martin's Case*, 2 H. & M. 669.

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the amalgamation was neither sanctioned by the 62nd clause of the articles of association, nor by the 161st section of the *Companies Act*, 1862, and praying that the usual order might be made for dissolving and winding up the affairs of the *Imperial Bank*; or that in the event of the voluntary winding up being allowed to continue it might be subject to the supervision of the Court, and that the rights of the Petitioners, as between them and their co-contributories and the liquidators in respect of their respective shares, might be determined under the provisions in this behalf of the above-mentioned Act; or else that notwithstanding the pendency of the said voluntary winding up, the Petitioners might be at liberty to institute such proceedings at law or in equity in reference thereto as they might be advised, and for this purpose to use the name of the said company or of the said liquidators.

The Master of the Rolls dismissed the Petition with costs; and from this decision the Petitioners appealed.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the Appellants:—

First, we contend that the above proceedings for the voluntary winding up of the company, and the amalgamation with the *Bank of Hindustan*, were *ultra vires* and invalid; and that under these circumstances there ought to be an order for a compulsory winding up. The articles of association gave no power to make such an arrangement. Nor did the directors propose to act under those articles; all the proceedings were taken under the 161st section of the *Companies Act*, 1862.

But the proceedings were informal and irregular under that section; and in such a case the strictest regularity will be enforced. The 161st section can only be put in force by the liquidators with the sanction of "a special resolution of the company by whom they were appointed;" and by section 51 a special resolution is defined to be one of which notice has been given specifying the intention to propose such resolution. In the present case, the circular of the 10th August, 1864, gave no notice of the intention to confer such powers on the liquidators: *Re Stearic Acid Company* (1); *Anglo-Californian Gold Company* v. *Lewis* (2).

(1) 11 W. R. 980. (2) 6 H. & N. 174.

But, independently of the irregularity, the arrangement is not such as was contemplated by the 161st section, nor such as this Court will sanction. The voluntary winding-up and the amalgamation being all one transaction must stand or fall together; and we therefore ask for an order for the compulsory winding up of the company: *Re Fire Annihilator Company* (1).

Secondly. If the Court should be unwilling to stop the voluntary winding up of the company, we ask that it may be continued under the supervision of the Court, according to the 147th section of the Act. The whole course of proceeding casts suspicion upon the liquidators, nor have they ever furnished any satisfactory accounts or explanation of their dealings with the funds.

Thirdly. We ask for a declaration of the rights and liabilities of the Petitioners and the other contributories, and a direction for payment of what may be found due, which the Court has power to do under the 138th and 165th sections of the Act, in the same manner as if the company were being wound up by the Court.

Fourthly. We contend that the Petitioners ought to be permitted to use the name of the company, or of the liquidators, in taking proceedings against the directors: *Re Bank of Gibraltar & Malta* (2). If they were to file a bill in their own names during the pendency of the winding up, the bill would be demurrable. And an action would be restrained by the injunction of this Court: *Re Keynsham Company* (3).

The *Attorney-General* (Sir *R. Palmer*), Mr. *Selwyn*, Q.C., Mr. *Roxburgh*, and Mr. *Waller*, for the *Imperial Bank* and the liquidators:—

The Petitioners seek, after great delay, to disturb an arrangement which was agreed to by all the shareholders except a small minority; and after it has been acted upon, and the affairs of the company entirely wound up. They are absolutely bound by the 161st section of the Act, and have now no *locus standi*. Their object in presenting this Petition is not the benefit of the contributories generally, but to get back their money which they have

(1) 32 Beav. 561. (2) Law Rep. 1 Ch. 69.
(3) 33 Beav. 123.

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justly forfeited. This is not a good ground for a winding-up order: *Re Catholic Publishing Company* (1).

Where there is no fraud or undue influence the Court will not set aside a voluntary winding up at the instance of a contributory; *Re Bank of Gibraltar & Malta* (2); *Re London & Mercantile Discount Company* (3). The Petitioners cannot impeach the amalgamation in the absence of the *Bank of Hindustan*, who have not been served with the Petition; nor is this the proper form of proceeding for that purpose; their remedy is by filing a bill: *Leifchild's Case* (4); *Foss* v. *Harbottle* (5). The point of informality relied on by the Petitioners is not alleged in the Petition, and there is no force in it. The circular of the 10th of August gave notice of the resolutions for voluntary winding up, on the footing of the agreement with the *Bank of Hindustan*, and for the appointment of liquidators; and this is sufficient to satisfy the words of the 161st section. There are no charges against the liquidators to justify the Court in making an order to carry on the winding up under the supervision of the Court. If the Court permits the Petitioners to take proceedings in the name of the company, or of the liquidators, it will only be on their giving an indemnity for costs; *In re The Bank of Gibraltar & Malta* (6).

Mr. *Baggallay*, in reply.

March 24. SIR G. J. TURNER, L.J., after stating the material facts, continued:—

There are four points raised by this appeal. First, whether an order ought to have been made for winding up this company compulsorily; Secondly, whether the voluntary winding up of the company ought to have been put under the supervision of the Court; Thirdly, whether the rights of the Petitioners could, and ought to have been declared; and, Fourthly, whether leave ought

(1) 2 D. J. & S. 116.
(2) Law Rep. 1 Ch. 69.
(3) Law Rep. 1 Eq. 277.
(4) Law Rep. 1 Eq. 231.
(5) 2 Hare, 461.
(6) Law Rep. 1 Ch. 69.

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to have been given to the Petitioners in any proceedings which they may be advised to institute to use the names of the company, or of the liquidators.

Upon the second of these points, I am of opinion, that this Petition was properly dismissed; but it may be right for me to say that I am by no means satisfied that the liquidators appointed for the purposes of the voluntary winding-up were proper persons to be appointed to that office, and that I am even less satisfied with the accounts rendered by those liquidators. They were, however, appointed by the company, and the Petition contains no allegations in any way impeaching their conduct. I desire it to be understood as my opinion, that in these cases the Court ought not to proceed upon affidavits as to facts which are not in issue. The looseness of the allegations and of the evidence in these cases, has led to enormous expense, and it is, in my opinion, the duty of the Court, as far as possible, to check this evil.

This case, in my view of it, falls to be decided upon the first, third, and fourth points. As to the first point, there was much argument at the bar upon the question of the validity or invalidity of the amalgamation of these companies, and upon several matters bearing upon that question; but in my opinion this is not a point we can decide in this jurisdiction. It cannot, I think, properly be decided in the absence of the *Bank of Hindustan*, who are in no way represented before us. In their absence it would, I think, be wrong for us to give any opinion upon the point, or upon any question—and there are many questions—arising out of or connected with it. If the resolutions for the voluntary winding up of this company had stood apart from the amalgamation I should have thought that the Petition ought to have been dismissed upon this point also; but the resolutions for winding up the company voluntarily, and for amalgamation, are plainly parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it; and if it cannot stand as to either, the Petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily. As to this part of the case, therefore, I cannot go the length of saying that this Petition ought to have been dismissed—my opinion is, that as to this first point the

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Petition ought to have been ordered to stand over until it be seen whether the Petitioners can successfully impeach the amalgamation, a question which cannot be decided in this jurisdiction.

Upon the third point also it seems to me that the right course would have been to have ordered the Petition to stand over. If the Petitioners succeed in setting aside the amalgamation, there will not probably be much difficulty in determining the rights as between them and their co-contributories.

As to the fourth and remaining point, I think that the Petitioners should have liberty to use the name of the company or of the liquidators. In the case of the *Bank of Gibraltar & Malta* we thought that this liberty should be given only upon the terms of an indemnity being given by the Petitioners; but looking to the facts of this case, I am not disposed to go further than to put the Petitioners upon an undertaking to submit to any order which the Court may make as to the costs of any proceedings which they may institute.

In addition to the points as to which I have said it would not be right for us to give any opinion, reliance was placed on the part of the Respondents upon the Petitioners not having sooner applied to the Court, and upon there being, as it was insisted, nothing remaining to be done towards winding up the company; but the facts of the case account for the delay in the application to the Court, and I cannot agree that if the amalgamation shall be found to be invalid, there will be nothing more to be done before this company is wound up.

For the reasons which I have given, my opinion is that the order of the Master of the Rolls should be discharged, and that in lieu of it an order should be made dismissing the Petition so far as it seeks to have the company wound up under the supervision of the Court, and directing that the rest of the Petition should stand over, with liberty to the Petitioners to take such proceedings as they may be advised for impeaching the amalgamation, and, if they should be so advised, to use the names of the company or of the liquidators in such proceedings, the Petitioners undertaking to abide by any order which the Court may make as to any costs which may be incurred in consequence of such proceedings, and

further ordering that, in the meantime, no order should be made for dissolving the company, and giving liberty to apply.

SIR J. L. KNIGHT BRUCE, L.J.:—I am of the same opinion on all the points.

Solicitors for the Petitioners: Messrs. *Harrison & Lewis.*
Solicitors for the Respondents: Messrs. *Newbon, Evans & Co.*

GOLDSMID *v.* THE TUNBRIDGE WELLS IMPROVEMENT COMMISSIONERS.

Injunction—Nuisance—Sewage—Increasing Injury—Scientific Evidence.

The sewage of a town had for many years been drained by commissioners acting under a local Act of Parliament into a stream passing through the Plaintiff's land, which was beyond their district, without perceptibly polluting it. But for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity. Decree of the Master of the Rolls restraining the commissioners from draining the town into the stream so as to pollute the water to the injury of the Plaintiff affirmed.

Assuming that a prescriptive right could be acquired of draining the sewage into the stream to the injury of the Plaintiff, it could only be acquired by the continuance of a perceptible amount of injury for twenty years.

Although the fact of prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase.

Observations on the weight to be attached to the conclusions of scientific witnesses.

THIS was an appeal from a decree of the Master of the Rolls.

The case is reported in the "*Law Reports,*" 1 Equity, p. 161. The facts are fully given in the previous report, and the following short statement will be sufficient for the present purpose.

The Plaintiff, Mr. *F. D. Goldsmid,* was the tenant for life of a mansion and estate near *Tunbridge Wells,* called *Somerhill.* The Defendants were Commissioners for the Improvement of *Tunbridge Wells,* under a local Act of the 9 & 10 Vict., which gave full

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powers to drain the town, to make sewers, and to turn any drain or sewer into a common ditch or watercourse.

In the execution of the powers of their Act, the Defendants drained the greater part of the town into a brook called *Calverley Brook*, which afterwards passed through the Plaintiff's estate, and supplied the water of an ornamental lake in his park. When the Plaintiff came into possession of the estate in 1859, the water of *Calverley Brook*, although at that time it received some of the drainage of the town, and also of the farms lying between *Tunbridge Wells* and *Somerhill*, was fit for domestic use; but since that time, and especially for the last three or four years, as the town increased in size, the amount of sewage flowing into the stream had greatly increased, and the Plaintiff complained that the water had become foul and unwholesome. The Plaintiff accordingly filed the present bill, praying that the Defendants might be restrained from permitting the sewage draining from the town of *Tunbridge Wells* to flow into *Calverley Brook*, or to pollute the water of the Plaintiff's lake and mill stream.

Considerable evidence was produced on both sides, from scientific and other persons, as to the condition of the water in the brook as it passed through the Plaintiff's land, and also at the *Powder Mill*, and other points which lay between the Plaintiff's land and the town.

The Master of the Rolls, before whom the cause was heard on motion for decree, granted the relief prayed by the bill, and from this decision the Defendants appealed.

Mr. *Rolt*, Q.C., Mr. *Baggallay*, Q.C., and Mr. *Renshaw*, for the Plaintiff:—

The fact of a certain measure of contamination of the water having existed for a length of time will not legalize an increased pollution: *Wood* v. *Waud* (1). Nor is the slightness of the nuisance at the present time a reason for refusing the injunction, if continuance is threatened: *Attorney-General* v. *Sheffield Gas Consumers' Company* (2). The sensible pollution of the stream is only of a recent date, but if the Defendants are not restrained, they may in time acquire a prescriptive right, and the

(1) 3 Ex. 748. (2) 3 D. M. & G. 304.

Plaintiff will be too late. The statutory powers of the Defendants confer no right to pollute the stream of the Plaintiff, or to injure his property which is beyond their district. Nor does the public benefit justify private injury: *Stockport Waterworks Company* v. *Potter* (1); *Attorney-General* v. *Mayor of Kingston* (2); *Bamford* v. *Turnley* (3); *Attorney-General* v. *Metropolitan Board of Works* (4); *Cator* v. *Lewisham Board of Works* (5); *Attorney-General* v. *Council of Borough of Birmingham* (6).

Mr. *Selwyn*, Q.C., and Mr. *J. Pearson*, for the Defendants:—

The Defendants have already acquired a prescriptive right to drain the town into the *Calverley Brook*. But if this were not so, there is no proof of any substantial injury to the Plaintiff caused by the Defendants' works. According to the evidence of the scientific witnesses, the contamination of the lake is attributable to other causes. The Defendants have a *primâ facie* right to use the stream for drainage purposes. The injury proved by the Plaintiff is very trifling. The real ground of his application to the Court is possible injury in future; this is no ground for the interference of the Court. The Plaintiff must prove present substantial damage, such injury as would entitle him to damages in an action at law: *Earl of Ripon* v. *Hobart* (7); *Mayor of Liverpool* v. *Chorley Waterworks Company* (8); *Clarke* v. *Clark* (9); *Durell* v. *Pritchard* (10); *Elmhirst* v. *Spencer* (11); *Embrey* v. *Owen* (12); *Sampson* v. *Hoddinott* (13); *Miner* v. *Gilmour* (14).

Mr. *Rolt*, in reply.

March 24. SIR G. J. TURNER, L.J., after stating the facts of the case, and the decree of the Master of the Rolls, continued:—

It is from this decree that the present appeal has been brought by

(1) 7 H. & N. 160.
(2) 13 W. R. 888.
(3) 3 B. & S. 62.
(4) 1 H. & M. 298.
(5) 11 Jur. (N.S.) 340.
(6) 4 K. & J. 528.
(7) 3 My. & K. 169.
(8) 2 D. M. & G. 852.
(9) Law Rep. 1 Ch. 16.
(10) Ibid. 244.
(11) 2 Mac. & G. 45.
(12) 6 Ex. 353.
(13) 1 C. B. (N.S.) 590.
(14) 12 Moo. P. C. 131.

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the Defendants. The argument on this appeal turned mainly upon the questions whether the discharge by the Defendants amounted to or occasioned a nuisance presently affecting the Plaintiff's estate; and if it did not, then whether the continuance of the discharge would result in producing such a nuisance; and in either case, whether the nature and extent of the nuisance, present or prospective, was such as that this Court ought now to interfere by injunction to prevent the discharge. But in the course of the argument upon these points, it was suggested on the part of the Plaintiff, that unless this Court interposed, a prescriptive right to discharge the sewage into the stream, to the prejudice of the Plaintiff's estate, might be acquired by the Defendants; to which it was answered on the part of the Defendants, that such prescriptive right, if it could at all be acquired, had been already acquired by them. It will be convenient, therefore, first to dispose of this point, and I am of opinion that the Defendants have not acquired any such prescriptive right. I assume, but without meaning to give any opinion upon the point, that such a right might well be acquired, but then I think that it could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the estate, at least to some extent, for the period of twenty years, and I think that the evidence sufficiently shews that the discharge has not prejudicially affected the estate for so long a period.

This point, therefore, may be laid aside, and in disposing of the case we may also assume that if the fouling of the stream by the Defendants amounts to a nuisance at law, and if this nuisance seriously affects the estate, this Court ought to interfere to prevent it.

There is not, so far as I can find, anything in the provisions of the Acts of Parliament under which the Defendants are acting, to authorize them to commit a nuisance upon property beyond the range of their jurisdiction. They could not possibly, so far as I can see, be justified in discharging the whole of the sewage of *Tunbridge Wells* bodily upon land not belonging to them, and lying immediately beyond the limits to which their powers extend; and if they have no right to do this, neither can they, as it seems to me, have the right to send down the sewage upon an estate which, although more distant, would be prejudicially affected by it.

We come, then, to the questions above proposed, the first of which, the question of present nuisance, is purely a question of fact, depending upon the weight of the evidence upon the one side and upon the other. There are two distinct branches of the evidence: first, what may be called the scientific evidence, and secondly, the evidence which points to the facts as they actually stand. Speaking with all possible respect to the scientific gentlemen who have given their evidence, and as to whom it is but just to say that they have dealt with the case most ably and most impartially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, the Court ought in these cases mainly to rely. I think so the more strongly in this particular case, because it is obvious that the scientific examinations which have been made of the water of this brook must have depended much upon the state of circumstances which existed at the times when those investigations took place. They might well have been affected by the force of the stream at the times of investigation, and probably by the state of the weather, as tending or not tending to the diffusion or dispersion of noxious smells. In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts.

How, then, does this case stand as to the facts? There are many witnesses on the part of the Plaintiff, who depose to the fact that, until within the last few years, the water of this brook was fit to be used, and was used, by them for drinking and for domestic purposes, and that it cannot now be so used. Some of these witnesses speak to the state of the water above and others of them to its state below the *Powder Mill*.

[His Lordship then entered into an examination of the evidence and continued:—]

Upon the fair result of the evidence on both sides it seems to me that the just conclusion to be drawn from it is that the solid

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sewage is almost if not wholly deposited before the stream reaches *Great Lodge*, but that the liquid sewage passes on and befouls the stream as well above as below the *Powder Mill*. Then, looking to the scientific evidence in connection with the facts that are proved, it seems to me that the evidence of the scientific witnesses on the part of the Plaintiff tends much to corroborate these conclusions, and that the evidence of the scientific witnesses on the part of the Defendants certainly does not displace them. The Defendants have attempted to refer the foulness of the water of the brook to other causes, but in my opinion the evidence on the part of the Plaintiff far outweighs that on the part of the Defendants upon this branch of the case. Upon the whole, therefore, my opinion is that the Plaintiff has established the existence of a nuisance, presently affecting the estate, by the water of the brook being befouled by the sewage discharged by the Defendants into it.

Then, as to the second question—that of prospective nuisance—I am satisfied upon the evidence that the nuisance in this case has been and is increasing, and in all probability will continue to increase; and, although I am not prepared to say that, if this case rested upon prospective nuisance only, enough is proved to warrant the interference of this Court, I am by no means disposed to think that where some degree of nuisance is proved to exist, and to have been increasing, the Court in determining whether it should interfere ought not to have regard to the prospect of its further continuance and increase. The interference of the Court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing; and the fact of the nuisance having commenced raises a presumption of its continuance.

10 Eq 137

This brings us to the question whether the nature and extent of the nuisance in this case is such that this Court ought to interfere by injunction to prevent it. I have throughout felt this point to be one of some difficulty. I adhere to the opinion which was expressed by me and by the Lord Chancellor in the *Attorney-General* v. *Sheffield Gas Consumers' Company* (1), that it is not in every case of nuisance that this Court should interfere. I think

(1) 3 D. M. & G. 304.

that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious: and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it. In this particular case, I think that regard must be had not merely to the comfort or convenience of the occupier of the estate, which may only be interfered with temporarily and in a partial degree, but that regard must also be had to the effect of the nuisance upon the value of the estate, and upon the prospect of dealing with it to advantage; and I cannot but think that the value of this estate, and the prospect of advantageously dealing with it, is and will be affected by the continuance of this nuisance. Upon this ground, and upon the ground of the water of the brook being rendered unfit for the use of the tenants and occupiers of the estate, I think that the interference of the Court in this case was due.

The Defendants relied, not by way of bar to the relief, but as evidence of there being no substantial injury, upon the Plaintiff not having sooner applied to the Court; but I think the delay in applying to the Court is sufficiently accounted for by the evidence. The Defendants also relied much upon the case of *Elmhirst* v. *Spencer* (1); but that case seems to me to be quite distinguishable from the present. In that case, as I understand it, the Court was of opinion that there having been no trial at law, which was necessary according to the then course of the Court, the nuisance was not established, and, further, that no injury was proved; but in this case, I think there is proof both of the nuisance and of the injury. Upon these grounds, my opinion agrees with that of the Master of the Rolls; and I think that this appeal ought to be dismissed, and dismissed with costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

I am of the same opinion, both on the facts and on the law.

Solicitors for the Plaintiff: Messrs. *Stephens & Son.*
Solicitors for the Defendants: Messrs. *Halse, Trustram, & Birt.*

(1) 2 Mac. & G. 45.

L. JJ.
1866
April 23.

3 Ch 7.

In re POLAND. 12 Jur NS 425.

Bankruptcy—Protection Order—Arrest—Debt contracted after Adjudication—Bankruptcy Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 112.

The word "creditor" in the Bankruptcy Acts applies only to creditors who are such at the time of the bankruptcy, and who have a right to come in and prove their debts under it. Therefore a protection order under the Bankruptcy Act of 1849, s. 112, does not protect from arrest by a creditor whose debt accrued subsequently to the adjudication.

THIS was an application to discharge a bankrupt who was in custody, and was brought up under a writ of *habeas corpus*. The facts were as follows:—

The prisoner presented a Petition of bankruptcy on the 1st of March, 1864. He was adjudicated a bankrupt on the 22nd of March, and he then surrendered and obtained the usual order for protection, which was subsequently renewed from time to time, and ultimately extended till the 29th of January, 1866.

On the 16th of December, 1865, he was arrested at his lodgings under a writ of *ca. sa.*, issued on a judgment which had been recovered against him on the 9th of December, 1865, in an action for goods delivered during the months of August and September in that year. At the time when he was arrested he was not engaged in any duties connected with the bankruptcy, but he had not passed his final examination. An application having been made to Mr. Justice *Byles*, at Chambers, for his release on the ground that the protection order protected him from all arrest, the matter was referred by the Judge to the Court of Common Pleas.

The question was argued before the Court on the 20th of January, 1866, when the Judges decided that the protection granted by the protection order applied only to proceedings by creditors who were creditors at the date of the bankruptcy; and, consequently, that the arrest was legal: *Phillips* v. *Poland* (1).

The bankrupt then obtained from the Lord Chancellor a writ

(1) Law Rep. 1 C. P. 204. 12 Jur NS 260

of *habeas corpus*, which was made returnable before the Lords Justices, and being brought up under it, he now applied for his discharge (1).

Mr. *Nasmith* for the Bankrupt:—

The words of the 112th section are "any creditor," and there is no reason for restricting the meaning of the words. On the contrary, the policy of the law is in our favour. The policy of the bankrupt laws has been to enlarge the privilege of the bankrupt previously to his obtaining his certificate. At Common Law he was privileged in going to and coming from the Commissioners: *Ex parte King* (2). Protection, independently of his attendance at the Court, was first given him by the 5 Geo. 1, c. 24, and was extended by the 5 Geo. 2, c. 30. In that Act, the reason for protection is given, namely, to enable him to prepare his accounts, and make full disclosure of his estate. The privilege is granted for the public benefit, and is attached to the *status* of the bankrupt as in the case of a member of Parliament; it must, therefore, apply to all creditors equally. If this arrest is legal, subsequent creditors would gain an unfair advantage over those who came in under the bankruptcy. *Ex parte Freston* (3); *Darby* v. *Baughan* (4); *Arding* v. *Flower* (5); *Davis* v. *Trotter* (6).

Mr. *H. Bullar* for the creditors, Plaintiffs in the action:—

The word "creditor" in the 112th section only refers to such as were creditors before the bankruptcy and can prove under it. General words in a statute ought to be restrained by the scope of the Act: *Reg.* v. *Poor Law Commissioners* (7). In all the Bank-

(1) The 112th section of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), on which the question turned, enacts as follows:—"That if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by *any creditor* in coming to surrender, and after such surrender during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed, as the Court shall from time to time, by endorsement upon the summons of such bankrupt, think fit to appoint."

(2) 7 Ves. 312.
(3) 30 L. J. (Ch.) 460.
(4) 5 T. R. 209.
(5) 8 T. R. 534.
(6) Ibid. 475.
(7) 6 Ad. & E. 56.

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ruptcy Acts the word "creditor" has this limited signification. And this is particularly so in the Act of 1861 (24 & 25 Vict. c. 134); as in sections 109, 116, 142, 144. But the question is concluded by authority: *Grace* v. *Bishop* (1) is expressly in point. The cases cited on the other side relate to debts which were proveable under the bankruptcy, and do not support the contention of the bankrupt.

Mr. *Hodgson*, and Mr. *T. A. Roberts*, for other creditors who had lodged detainers since the bankrupt had been in custody.

Mr. *Quain*, for the Sheriff of Middlesex.

Mr. *Nasmith*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

I am of opinion that the judges of the Court of Common Pleas could not have decided otherwise than they have done. The word "creditor," in the section referred to, ought to be read in a limited sense—not every creditor, but olny those who were creditors in the circumstances enumerated by the Act. The present creditor does not come within the meaning of the particular clause in the Act. I am of opinion that the judges decided rightly, and that there is no case whatever for the bankrupt's discharge from custody.

SIR G. J. TURNER, L.J.:—

I also agree with the learned judges of the Court of Common Pleas. There can be no doubt that the general words in an act of parliament must be construed in accordance with the circumstances to which the act was intended to apply. This was held in a remarkable case on the construction of the 1 & 2 Vict. c. 110, where it was held that the word "tithes" in the act must be confined to lay tithes (2). This doctrine is clear from a long list of authorities, which I believe are all founded on a case in *Plowden* (3). Here the words are "any creditor;" but if there

(1) 11 Ex. 424. (2) *Hawkins* v. *Gathercole*, 6 D. M. & G. 1.
(3) *Stradling* v. *Morgan*, Plowd. 204.

could be any doubt as to the meaning to be attached to them, I think it is set at rest by the latter part of the section. The release there spoken of must refer to an imprisonment for debts which are the subject of the proceedings in bankruptcy. The distinction between creditors under the bankruptcy and beyond it, may have been made because the adjudication operates as a judgment in favour of all creditors under the bankruptcy. The Legislature may well have intended to say that those creditors who had already got this security should be restrained from taking independent proceedings; but those who are outside the bankruptcy are altogether in a different position. The application must be refused with costs.

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Solicitors for the Bankrupt: Messrs. *Cuddon & Miles.*
Solicitors for the Creditors: Messrs. *Bothamley & Freeman.*
Solicitors for the Sheriff: Messrs. *Burchell & Hall.*

BATEMAN *v.* BOYNTON.

L. JJ. 1866 *March* 16, 19; *April* 21.

Inclosure Act—Award—Jurisdiction of Court of Chancery to rectify Award.

An award was made in the year 1765 by Inclosure Commissioners, acting under the authority of an Act of Parliament, whereby they apportioned certain lands and a rent-charge between the rectors of *B.* and curates of *U.* The Plaintiff, who was now curate of *U.*, complained that this allotment was beyond the power of the Commissioners, and prayed that the award might be rectified, and a fresh partition made:—

Held, reversing the decision of the Master of the Rolls, that on the true construction of the Act the Commissioners had power to make the allotment; but *semble*, that if they had acted *ultra vires*, this Court would have had no power to rectify the award.

16 BD. 169

THIS was an appeal from a decree of the Master of the Rolls.

The suit was instituted by the Rev. *Gregory Bateman*, who was the patron, and also incumbent, of the vicarage or perpetual curacy of the township of *Ulrome*, in the county of *York*, against Sir *Henry Boynton*, the patron, and the Rev. *Griffith Boynton*, the rector, of the parish of *Barmston*.

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The township of *Ulrome* is situate partly within the parish of *Barmston* and partly within the parish of *Shipsea*, and, previously to the year 1765, all the tithes and ecclesiastical dues issuing out of the township of *Ulrome* belonged to the vicar or perpetual curate of that township, and to the Archbishop of *York* and his lessees, except some parts of these tithes and dues which belonged to the rector of *Barmston*. In the year 1765, a local Act of Parliament was passed entitled "An Act for dividing and inclosing the open and common fields and grounds within the township of *Ulrome*, otherwise *Owram*, in *Holderness*, in the county of *York*." The Act recited that Sir *Griffith Boynton* was patron of the rectory of *Barmston*, and of the curacy of *Ulrome*, and that *John Holme* was rector of the said rectory, and also curate of *Ulrome* aforesaid, and entitled to all the tithe of hay yearly arising within the said township, as well from the open fields intended to be inclosed as from the old inclosure there; and as rector of *Barmston* aforesaid was also owner of and entitled to the tithe of corn and hay yearly arising from 23½ oxgangs, and certain odd or forby lands within the said township of *Ulrome*, otherwise *Owram*, and the tithe of wool and lamb of 13 of the said oxgangs of land, and was also entitled to Easter offerings, surplice fees, certain hens payable at Christmas, and to the yearly sum of 17*s.*, payable by the owners or occupiers of certain dwelling-houses there, and was also entitled to certain glebe lands, cattle-gates, whins or furze within the said township. The Act further recited the rights of the lessees of the Archbishop of *York*, and other persons in the said township, and then proceeded to enact that the said common lands and grounds should be set out and allotted by the Commissioners therein named, unto and among the several proprietors and persons interested in the same lands and grounds *in proportion to their respective rights and interests therein*, subject nevertheless to such rules, orders, directions, and provisions as in the said Act were thereinafter established and provided. And it was enacted that the said Commissioners should in their several valuations, have regard as well to the quantity and quality as to the situation of the said land so to be allotted.

By the 6th section it was enacted that the Commissioners

should allot unto the said *John Holme* and his successors, rectors of the said parish of *Barmston*, and curates of *Ulrome*, according to his present right and interest, such parcel or parcels of land —part of the said open and common fields and grounds thereby directed to be inclosed—as in the judgment of the said Commissioners, or any two of them, should when inclosed be of the yearly value of £33 4*s.* 9*d.* in part satisfaction for the tithes, and should also allot to the Archbishop of *York*, and his lessees, a piece of land of the yearly value of £25 in part compensation for their tithes.

By the 7th section it was enacted that a yearly rent or sum of £34 0*s.* 9*d.* should be paid unto the said *John Holme*, and his successors, rectors or curates as aforesaid, and another yearly sum of £25 to the Archbishop and his lessees, to be arising out of, and charged upon, as well the said lands so directed to be inclosed as the ancient inclosed lands within the said township.

By the 9th section it was enacted that immediately after the said division and allotment of the said fields and grounds should be made, and the award should be made and executed, all tithes, of what nature or kind soever, belonging to or claimed by the said *John Holme* or his successors, and the said Archbishop and his lessees, arising within the said lands thereby intended to be inclosed, or within the said ancient inclosure, should cease, determine, and be extinguished.

The 10th section provided that nothing therein contained should prejudice the right of *John Holme* or his successors, curates of *Ulrome*, to the personal Easter offerings which had been usually paid there, and to the hens usually payable at Christmas, or to the yearly sum of 17*s.* payable out of certain farms at *Ulrome*, or to the customary surplice fees.

The 11th section directed the Commissioners to set out roads and to order fences and ditches to be made and kept in repair by the proprietors.

The 25th section provided that in case there should be any error or omission in the description of any person's right or property, or if any dispute or difference should arise between any of the parties interested in the said intended inclosure, concerning the respective shares, rights, and interests which they or any of them then had, or

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might before the said division claim to have, in the lands and grounds thereby intended to be divided and allotted, or concerning the respective shares and proportions which they or any of them ought to have of and in the said intended division, the Commissioners should, by examination of witnesses upon oath, or upon other proper and sufficient inquiry, evidence, and satisfaction, hear and finally determine the same, and such determination being set forth in the award, should be binding and conclusive on all parties.

The 62nd section provided that such shares, parts, proportions, and allotments of the said lands and grounds as should be so set out by the Commissioners, should be binding and conclusive on all the said proprietors of the said lands and grounds, and persons interested therein, their heirs, successors, executors, administrators, and assigns respectively.

At the time of the passing of this Act of Parliament the patron of the rectory was also patron of the curacy, and the incumbent of the rectory was also incumbent of the curacy; and this continued to be the case as to the patronage until the year 1801, and as to the incumbency until the year 1829.

The Commissioners' award in pursuance of the Act, which was made the 28th of February, 1767, so far as it related to the interest of the rector of *Barmston* and curate of *Ulrome*, was as follows:—

"We do hereby award, allot, and assign unto the said *John Holme* and his successors, *rectors of the said parish of Barmston*, 7 acres and 5 perches lying in the said North Field, adjoining upon a private way, &c. And we do order and direct that the said *John Holme* and his successors shall for ever hereafter maintain a ditch and fence on the north end and east and west sides of the said allotment, dividing the same from the said private way and from the said allotment. And we do award, allot, and assign unto the said *John Holme* and his successors, *rectors of the said parish of Barmston*, in severalty, 67 acres 1 rood 23 perches, lying in the said *Brigdale* North Field adjoining, &c. And we do order and direct that he the said *John Holme* shall for ever hereafter maintain the ditch and fence on part of the west side of the same allotment,

dividing the same from part of the said lands of the said *Sarah Acklom*, &c.; which two last-mentioned allotments, containing 74 acres 1 rood 28 perches, we estimate and adjudge (when inclosed) to be of the yearly value of £33 4*s.* 9*d.*; and do allot the same in part of the compensation for the tithes, glebe, gates, whins, and furze due as aforesaid unto the said *John Holme* and his successors, rectors of the said parish of *Barmston*."

The award then proceeded to make certain other allotments to other persons, and then to declare that the composition rent of £34 0*s.* 9*d.* mentioned in the said Act should be divided and paid as thereafter mentioned. And by the said award it was directed that an annual composition rent of £19 0*s.* 9*d.* (part of the said rent of £34 0*s.* 9*d.*) should be paid to the said *John Holme* and his successors, as rectors of the parish of *Barmston*, and one other annual composition rent of £15 (residue of the said rent of £34 0*s.* 9*d.*), should be paid to the said *John Holme* and his successors, as curates of *Ulrome*. And the award then allotted the proportions in which the proprietors of land should pay the said respective rent-charges to *John Holme* and his successors, rectors of *Barmston*, and to *John Holme* and his successors, curates of *Ulrome*.

The Plaintiff was presented to the curacy of *Ulrome* in February, 1862. In his bill, which was filed in June, 1864, he insisted that the Commissioners had no power to allot the two pieces of land in severalty to the rectors of *Barmston*, but that they were bound by their Act to allot land and rent of the specified annual value to *John Holme* and his successors, rectors of *Barmston* and curates of *Ulrome*, without partitioning the same, but leaving them to be enjoyed by the incumbents in the proportions in which the rights of the rectory and curacy were enjoyed previously to the Act.

As the award stood it was, according to the contention of the Plaintiff, quite inconsistent with the relative rights of the two incumbents, and he entered into evidence on this point. The bill prayed a declaration that the two pieces of land allotted to the said *John Holme* and his successors as rectors of *Barmston* ought to have been allotted to him and his successors as rectors of

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Barmston and curates of *Ulrome*, and that such rectors and curates and their respective successors were respectively interested therein in the same shares as they were interested in the common and other rights, and in the glebe lands, before the passing of the *Ulrome Inclosure Act*; and it prayed for a partition on the footing of this declaration.

The Master of the Rolls was of opinion that the allotment of the land in severalty to the rectors of *Barmston* was not authorized by the Act, that the omission of all mention of the curacy of *Ulrome* in the allotment of the land arose from an accidental error, and that the Court had now power to rectify the mistake; and he made a decree granting in substance the relief prayed by the bill. From this decree the Defendants appealed.

Mr. *W. M. James*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff:—

It is most probable, as the Master of the Rolls held, that there was an accidental error in the award; but however that may be, the Commissioners acted beyond their power in making allotments in severalty between the two incumbencies. The result is that the allotment ought to follow the rights of the parties before the award: *Doe* v. *Hellard* (1); *Garrard* v. *Tuck* (2).

The Court of Chancery has jurisdiction to rectify the mistake. If the allotment had been within the powers of the Commissioners their decision could not have been disturbed in the absence of fraud; but here they acted *ultra vires*, and therefore what they did is not protected by the Act.

The lapse of time is no bar in this case, for there was no adverse possession until 1829. In such a case the Court will act by analogy to the provisions of the *Statute of Limitations* (3 & 4 ~~Vict.~~ Will. c. 27, s. 29), with regard to ecclesiastical rights, which allow three incumbencies or sixty years for bringing an action.

Mr. *Selwyn*, Q.C., and Mr. *E. K. Karslake*, for the Defendants:—

The recitals and the whole scheme of the award shew that the Commissioners intended to allot the land as they did, and that there was no accidental mistake. It is also clear upon the con-

(1) 9 B. & C. 789. (2) 8 C. B. 231

struction of the Act that the Legislature intended them to allot both land and rent-charge according to the interests of the two incumbents. It would have been unreasonable to leave the parties to take proceedings for a partition at some future time. If the Commissioners acted *ultra vires* as to the land, the allotment of the rent-charge must also be re-opened and the rights of the neighbouring proprietors with respect to the fences and payment of their proportions of the rent-charge would have to be readjusted.

No fraud or misconduct is alleged against the Commissioners, and in the absence of such allegation this Court has no power to rectify the award, which derives its force from the Act of Parliament: *Attorney-General* v. *Jackson* (1); *Cooper* v. *Thorpe* (2); *Cooper* v. *Walker* (3); *Lister* v. *Lister* (4); *Earl of Clarendon* v. *Hornby* (5); *Peers* v. *Needham* (6).

In considering the lapse of time, the Court will reckon it from the completion of the award. It would be impossible at this distance of time to place the parties in their original position; nor has the Court the power to ascertain satisfactorily the rights of the parties or the value of their interests at the time of the award.

Mr. *W. M. James*, in reply.

April 21. SIR G. J. TURNER, L.J., after stating the facts and pleadings in the case, continued:—

This case, as it has presented itself to my mind, may be considered as depending upon three points: First, whether the Commissioners under the Act of Parliament had power to apportion the land of the yearly value of £33 4*s.* 9*d.*, and the yearly rent of £34 0*s.* 9*d.*, between the rector and the curate; secondly, whether if they had this power and intended to exercise, and did exercise it, by their award, there was a mistake in the award; and thirdly, whether if the Commissioners had not the power to allot

(1) 5 Hare, 355.
(2) 1 Sw. 92; S. C. 2 Russ. 78.
(3) 4 B. & C. 36.
(4) 3 Y. & C. Ex. 540.
(5) 1 P. Wms. 446.
(6) 19 Beav. 316.

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between the rector and curate, or if they had the power so to allot, and there was a mistake in the award, it is competent to this Court to adjust the rights between the rector and the curate in the mode adopted by this decree or otherwise.

As to the first of these points, the Master of the Rolls has been of opinion that the Commissioners had not the right to allot and divide the lands of the value of £33 4*s.* 9*d.* between the rector and the curate, founding his opinion, as I collect from a printed note of his judgment which has been handed to us, upon the ground that the land was given by the Act to *John Holme* and his successors, rectors and curates, and that no power is given by the Act to the Commissioners to make any allotment or division of what is so given by the Act; but, upon considering this Act, find myself unable to agree in the conclusion at which the Master of the Rolls has arrived on this point. We cannot, in my opinion, be justified in supposing that the Legislature was not aware, or did not foresee, that the rectory and curacy might thereafter be separated. The Act deals not with this land only, but also with the rent, and whatever may have been intended as to the rent must, I think, be taken to have been intended as to the land also. Looking to the general provisions of the Act, the object and purpose of it seems to have been that the different proprietors should hold their allotted portions, subject only to the charges created by the Act. The proportions of the rent to be charged upon these allotted portions were to be fixed by the Commissioners; there are no provisions for varying the amount of the rent as fixed by them, or for the recovery of the rent when varied, which would have been absolutely necessary, unless it had been intended that the Commissioners should have power in the first instance to apportion the rent as between the rector and the curate. Then again, looking to the details of the Act, there is first a recital of the different interests of the rector and curate in the tithes: for what purpose was this recital introduced, if no regard was to be had to their different interests? Again, the allotment in question is to be made to *John Holme* and his successors, according to his present right and interest. What is the meaning of these latter words unless they point to his different interests as rector and as curate? Besides this, the 23rd clause of the Act

provides that, in case there be any error or omission in the description of any person's right or property, the Commissioners are to determine the same, and their determination is to be binding on all parties. Looking, therefore, both to the general purview and to the particular provisions of this Act, I cannot but think, with all deference to the Master of the Rolls, that it was intended by the Act to give, and that the Act did give, power to the Commissioners to apportion both the land and the rent between the rector and the curate according and in proportion to their respective rights and interests.

Then, as to the second point: I respectfully differ from the Master of the Rolls upon this point also. The land is in terms allotted to *John Holme* and his successors, rectors of the parish of *Barmston*, and it is, in my opinion, clear that this allotment was not so made *per incuriam;* as we find in the subsequent part of the award that the rent is allotted in part to *John Holme* and his successors as rectors, and in part to him and his successors as curates, and each part is charged upon the several proprietors according to their respective interests. It is impossible, therefore, as it seems to me, to say that there was a mistake in the award, unless indeed it was a mistake on the part of the Commissioners to assume that they had power to apportion.

Such being my opinion upon the first and the second points, it is unnecessary for me to give any opinion upon the third point; but I confess that I feel the greatest possible difficulty in agreeing that, in any view of this case, it could be competent to this Court to adjust the rights between the rector and the curate in such a suit as this, if in any suit. Assuming that there was a mistake, it could not surely be undone as to the land, and left standing as to the rent; and how could it be undone as to the rent in the absence of the proprietors of the land on which that rent is charged? In ordinary cases, where a transaction is undone for mistake, the parties are to be restored to their original rights; but this could not be done in the present case, as the tithes are extinguished by the Act. It is suggested by the bill that the award may be considered to be null and void, and that then the land and the rent would be apportionable according to the original rights of the parties; but even assuming the award to

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be null and void, as suggested by the bill, the difficulty of apportioning the rent, to which I have already adverted, will remain. Besides, I am by no means prepared to say that this Court can be made subsidiary to a tribunal created by Parliament for settling the rights of parties upon the mere ground that that tribunal has miscarried in the settlement of those rights. The authorities referred to on the part of the Plaintiff in support of his case have not, I think, any bearing upon the question before us. They go to the point that an allotment will follow the title to the property in respect of which it was made; but here the question is in what right the allotment was made. Upon the whole, my opinion is that this decree cannot be maintained, and that this bill ought to have been, and ought now to be, dismissed, and, I think, with costs.

SIR J. L. KNIGHT BRUCE, L.J. :—

My view of this case is the same as that of the Lord Justice, and it is mainly founded on the consideration that, having regard to the nature of the case, this Court has no jurisdiction to act for the purpose, and to the extent, for which and to which it has acted. It will be the safer, the better, and the wiser course to dismiss the bill with costs. There will be no costs of the appeal.

Solicitor for the Plaintiff: Mr. *W. N. Finch.*
Solicitors for the Defendant: Messrs. *R. Lambert & Son.*

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Partnership—Division of Assets.

Feb. 22, 24; *April* 25.

The Plaintiff and Defendant had been partners under articles providing that the business should be carried on "for the mutual and common benefit of the partners, and risk of profit and loss in equal shares." The Defendant's capital was to be £1500; the Plaintiff's, £750. The capital of each partner to carry interest at £5 per cent., to be allowed yearly, before making up the accounts. Sums brought in by either partner above those amounts to bear interest at the same rate, payable before any other interest, and to be withdrawable at three months' notice. The partners were to be at liberty to draw certain specified sums on account of their shares of profits. The remainder of each partner's share of profits to be added to his capital, and bear interest at £5 per cent., to be paid before division of net profits. On dissolution, after payment of debts, "the remaining capital, stock, moneys, and credits belonging to the said partnership shall be divided, or received, or taken by the said partners according to their respective shares or interests therein." On dissolution, the capital standing to the Plaintiff's credit was not much increased; that of the Defendant greatly so, partly by accumulation of profits, and partly by cash brought in by him. After payment of debts, the assets were insufficient to replace the two capitals in full:—

Held, varying the decree of the Master of the Rolls, that the assets, after payment of debts, ought to be applied first in repaying to the Defendant, with interest, the additional capital brought in by him in cash, and that the residue ought to be divided between the partners in proportion to their capitals.

IN this case the Plaintiff and Defendant in the year 1855 became partners in the trade and business of coal and stone merchants. By the articles of partnership between them, bearing date the 23rd of March, 1855, they agreed to become partners in that business, as from the 12th of March, 1855, up to the 25th of December, 1869, subject to a power of determining the partnership on the 25th of December, 1862, by notice. The firm of the copartnership was to be *Scoles & Wood*, and the business was to be carried on at the leasehold premises of the Plaintiff, at *Market Wharf*, where he then carried on the business, or at such other place or places as the partners should afterwards agree upon. The clauses material for the present purpose were as follows:—

"7. That the said joint business and all buyings and sellings,

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and other transactions relative thereto, shall be made and carried on for the mutual and common benefit of the said partners, and risk of profit and loss in equal shares and proportions.

"8. That the amount of capital to be brought into the said business by the said *James Scoles*, shall be the sum of £1500, and the amount of capital to be brought into the said business by the said *Octavius Wood* shall be the sum of £750, and that the capital of each of the said copartners in the said business for the time being shall carry interest after the rate of £5 per cent. per annum, and that such interest shall be paid and allowed to each partner yearly, prior to the annual making up of the accounts of the said copartnership as hereinafter mentioned.

"9. That if either of the said copartners shall, with the consent of the other of them, lend, or bring into the said joint-stock trade in aid of the capital thereof any sum or sums of money beyond the amount of capital hereinbefore agreed to be brought into the said business by each of the said copartners, he shall be allowed and entitled to receive and take interest in respect thereof at the rate of £5 per cent. per annum, before any other payment of interest shall be made, and the said copartners shall be at liberty to withdraw any excess or surplus capital over and above the amount of capital hereinbefore agreed to be brought into the said business by each of the said copartners, by giving three calendar months' previous notice, in writing, of his intention so to do to the other of them, and in like manner such excess or surplus shall be withdrawn by the party advancing or having the same, on three calendar months' notice, in writing, being given to him by the other of them, from the expiration of which last notice all interest on such excess or surplus shall cease.

"10. That each of the said copartners shall be allowed to draw out of the funds of the said copartnership, in anticipation of their respective shares of the profits thereof during each year, the sum of £3 per week, and to be accounted for in part of their respective shares of the net gains and profits of the said business; and that at the end of every year each of them the said copartners shall be allowed to draw out the further sum of £50 in respect of his share, if the net gains and profits of the said business will allow thereof; and that the remainder of the share of each of the said

copartners in the net gains and profits of the said business (if any) shall not be drawn out by them, but shall remain in the said business and be carried to the account of each of them in the books of the partnership, and accumulate in addition to the capital of each of them therein, and that each of them the said copartners shall be allowed and paid interest yearly upon such additional capital at the rate of £5 per cent. per annum, prior to the annual division of the net gains and profits of the said business.

"12. That the said *Octavius Wood* shall devote the whole of his time and attention to the said business, and shall not be engaged in or carry on any other trade or business whatsoever, but that the said *James Scoles* shall have full liberty and license to engage in, and carry on, any other business and occupation on his individual account as he may think proper, and shall be bound to devote no more of his time and attention to the business of the said copartnership than he shall think fit.

"21. That upon the expiration of the said partnership by effluxion of time, or upon the said copartnership being so dissolved in pursuance of the powers lastly hereinbefore for that purpose contained, or in case of either of the said copartners having given such notice of his intention to put an end to and determine the said copartnership as hereinbefore is mentioned, then and in either of the said cases, within one calendar month after the said copartnership shall be so put an end to and determined, a true and particular account in writing shall be stated, settled, and signed between and by the said partners of all the moneys, stock-in-trade, machinery, plant, and fixtures, lease and premises, debts and effects then belonging or due and owing to the said partnership, and of all debts and sums of money due or owing from or on account of the same to any person or persons whomsoever, and that, after payment of all the same debts and sums of money, and performance of all outstanding engagements which shall have been entered into by or on account of the said partnership, the remaining capital, stock, moneys, and credits belonging to the said partnership shall, after making due allowance for any desperate or dubious debts which may be outstanding, be divided or received, or taken by the said partners according to their respective shares or interests therein."

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This partnership was determined on the 25th of December, 1862, in pursuance of a notice given by the Defendant under the power contained in the articles. Pending this notice, and before the determination of the partnership took effect, a further agreement was made between the Plaintiff and Defendant, dated the 19th of December, 1862, which provided that the Defendant should get in the partnership moneys, and pay all debts owing by the partnership, and take to the trade stock of the partnership at the price therein mentioned, the price to be debited to his account on taking the accounts of the partnership. The leasehold premises in which the business was carried on were to be assigned to the Defendant in consideration of his indemnifying the Plaintiff against the rent and covenants, and the agreement proceeded as follows:—

"6. That as soon as conveniently may be after the said 25th day of December next, an account shall be had and stated by and between the said parties in respect of the said partnership estate and effects, and a division made of the assets of the said partnership after paying or providing for the payment of the debts and demands therein, which said account shall be had and taken in the manner provided by the 21st article of the said Articles of Partnership (save as otherwise provided for by these presents)."

In pursuance of this agreement the Defendant proceeded to get in the assets of the partnership, and got them in to a considerable amount, and paid the proceeds into the *London & Westminster Bank* to the joint account of himself and the Plaintiff. Out of the money so paid in he paid the debts due from the partnership, and after payment of them there remained in the bank a large balance, amounting, as alleged by the bill, to £1873 3*s.* 8*d.* There also remained a considerable amount of outstanding debts due to the partnership. The capital of the Defendant in the partnership at the time of the dissolution very far exceeded that of the Plaintiff, and in this state of circumstances the Defendant insisted that he was entitled to apply the balance remaining in the bank, after payment of the debts of the partnership, in payment of the excess of his capital above the capital of the Plaintiff; and further, that the balance at the bank being insufficient to pay the full amount of such excess, the Plaintiff was bound to pay him the deficiency,

amounting, as he alleged, to £700 7*s.* 3*d.* The Defendant accordingly applied the greater part of the balance at the bank in payment to himself of his excess of capital above mentioned, and thereupon, in March, 1864, the Plaintiff filed the bill in this cause to have the rights of the parties determined by the Court.

Upon the hearing of the cause before the Master of the Rolls, his Lordship made the following decree:—

"The Court being of opinion that the surplus assets of the partnership between the Plaintiff and the Defendant in the pleadings mentioned, remaining after payment of all the partnership debts and liabilities, ought to be divided rateably between the partners according to the amount of the respective capitals of the partners at the date of the dissolution of the said partnership, it is ordered that the following account, on the footing expressed in such opinion, be taken, namely: An account of the partnership dealings and transactions between the Plaintiff and the Defendant; and that what, upon taking such account, shall be certified to be due from either of the parties to the other of them, shall be, within one calendar month from the date of the Chief Clerk's certificate, paid by the party from whom to the party to whom the same shall be certified to be due; and that the Defendant do, without prejudice to any question in this cause, on or before the 1st day of March, 1865, pay into the bank, with the privity of the Accountant-General, to the credit of *Wood* v. *Scoles*, 1864, W. 54, £400." Liberty to apply.

It appeared that the £400 was the estimated amount which would be coming to the Plaintiff in respect of his share of the balance at the bank, upon the footing of the Master of the Rolls' opinion.

The Defendant appealed from this decree. Upon the opening of the appeal, their Lordships thought it desirable that the partnership accounts should be taken before any declaration of the rights was made, and accordingly varied the decree by directing the usual partnership accounts, ordering the £400 to be invested and accumulated; such payment and investment to be

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without prejudice to any question; and by adjourning the further consideration of the cause and of the deposit paid on setting down the appeal; such further consideration to be had before their Lordships.

In pursuance of this order, the partnership accounts were taken by the Chief Clerk. It is unnecessary to enter into them further than to say, that in round numbers the assets were worth £3000, that the capital standing to the Plaintiff's credit was £830, and the capital standing to the Defendant's credit £4000, so that the realized assets of the partnership remaining after payment of the debts were insufficient to make good to the Defendant the excess of the capital which he had in the partnership at the time of the dissolution beyond the capital which the Plaintiff then had therein. This excess arose partly from accumulation of profits under Clause 10 of the Articles, and partly from moneys actually brought by the Defendant into the business beyond what he was bound to bring. The cause now came on before their Lordships for further consideration.

Mr. *Hobhouse*, Q.C., and Mr. *Bristowe*, for the Plaintiff:—

We contend that, after payment of the debts owing to strangers, the residue of the assets, being insufficient to pay the capitals, is to be divided between the Plaintiff and Defendant in proportion to the capitals standing to their respective accounts at the time of dissolution. The fair construction of the Articles, we submit, is, that losses fall rateably on the capitals, and that it is only when the capital is all gone that the partners are to contribute to losses equally. Suppose there were no express contract, the assets would belong to the partners equally (1). Suppose, then, a simple agreement to carry on the business on terms of mutual benefit and risk, if they bring in unequal capitals you cannot infer that they guarantee each other's capitals; nor can you infer such a guarantee from anything in this deed. Clause 7 expresses nothing but what would be inferred in the absence of any evidence of what the agreement was. Under this clause the profits are equally divided while the business goes on; but we should expect a different rule to be applied when the business ceases, an entirely new state of

(1) Lindley's Partnership, i. 573; Smith's Mer. Law, 3rd ed. 30.

things having arisen. We say that each partner is to be treated as a creditor against the assets for his capital. If the assets are sufficient, each partner will be repaid his capital, and the surplus be divided equally; if they are insufficient, the assets must be divided rateably between the partners. The proposition for which the Defendant contends leads to such an unjust result, that it ought not to be adopted unless clearly provided for, since the case stands thus: each partner's capital is increased by adding to it a share of profits, estimated without making (as it turns out) a sufficient allowance for bad debts; a large mass of debts proving bad, the Defendant seeks to throw the whole loss on the Plaintiff.

Mr. *Baggallay*, Q.C., and Mr. *Bagshawe*, for the Defendant:—

The governing principle of these articles is that indicated by the 7th clause, that the partners are to share profit and loss equally, which is expressed in wide terms, including all profit and loss. The principle contended for by the Plaintiff makes them bear the loss discovered on winding up in proportion to their nominal capitals. The 9th article throws light on the subject by shewing that additional capital is treated as a loan. The Plaintiff's contention proceeds upon a misunderstanding of what constitutes profit and loss. Take the clear value of the partnership property at the beginning of the year, after deducting debts, and take the same at the end of the year; the difference between these is the profit or loss, as the case may be, for that year; and this, by the terms of the articles, is to be shared equally. The result at the present time may be stated roughly thus: Capitals of the two partners £5000; assets £3000. There is, therefore, a loss of £2000, to which, according to Clause 7, the partners are to contribute equally. It is not disputed on the other side that during the continuance of the partnership this would have been so; but they say that Clause 21 brings in a different rule on a winding up. But something clear ought to be found to control the perfectly clear words of Clause 7; and what do we find? a direction to divide the surplus moneys between the partners according to their respective shares or interests therein. It does not say in proportion to their capitals. The expression is a general one, merely

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meaning that the surplus moneys are to be divided between the partners, according to their rights as ascertained from the preceding clauses of the articles. If division in proportion to the capitals was intended, why was it not expressed? Then as regards the argument derived from bad debts, it is entirely in favour of our contention; for, according to our view, the loss occasioned by bad debts falls on the parties equally; but, according to the view of the other side, the Plaintiff who kept the books obtains a benefit by not having written off enough for bad debts, since his not having done so increases the nominal capital of each partner by the same amount, and so lessens the disproportion between the capitals. Again, suppose the capital to have been all employed in paying debts, leaving some debts unpaid, those debts must, of course, have been borne by the partners equally; but if one of the partners, a week before the dissolution, had brought in enough to pay them, he would, according to the decision of the Master of the Rolls, lose nearly all of it. The intention of the parties, as shewn by the articles, was to treat the capitals of the respective partners as debts of the concern. At all events, this is most distinctly indicated as to cash advances brought in.

Mr. *Hobhouse*, in reply:—

The partners looked upon assets and capital as the same thing, and the 21st clause provides for division on that footing. It was intended that the partners should be interested in the property of the concern in proportion to the amounts of capital standing to their credit in the books. The division of profits was different, because the labour and skill of the poorer partner, who was the chief acting partner, had to be taken into consideration. That the Defendant should lose more money than the Plaintiff, need not startle us. The Defendant has lost nothing but money, the Plaintiff has spent his time and labour.

April 25. SIR G. J. TURNER, L.J., after stating the facts of the case, continued:—

It was insisted, by the Defendant, in support of the appeal, that

the opinion of the Master of the Rolls embodied in the decree, and on which it proceeds, is altogether erroneous, or at all events is erroneous in so far as it extends to moneys which were brought by the Defendant into the partnership, and were not derived from the accumulation of profits provided for by the 10th clause of the articles, and that these moneys at least (and it was admitted on the part of the Plaintiff that some moneys were so brought in by the Defendant) ought to be considered as loans to the partnership.

The argument upon the part of the Appellant was based upon this—that the risk of profit and loss was, according to the 7th clause of the articles, to be taken and borne by the partners in equal shares and proportions; and it was clearly pointed out in the argument, that if the construction put by the Master of the Rolls upon these articles were supported, the proportion of loss which would fall upon the Defendant would be much greater than that which would fall upon the Plaintiff. That this would, in fact, be the case, I see no reason to doubt; but this fact does not seem to me to displace the view which the Master of the Rolls has taken of the case. His Lordship's opinion, as I understand his judgment, was this: that this 7th clause of the articles was meant to apply, and in fact applied, only during the continuance of the partnership, and the principal, if not the only question in this case, seems to me to be whether this opinion is right or not. Upon considering the whole of these articles, the conclusion at which I have arrived is that it is right. The 21st clause of the articles provides that, upon the determination of the partnership, the surplus assets, after payment of the debts, shall be divided between the partners according to their respective shares or interests therein. If the debts referred to in this clause be meant to include the capitals of the partners as debts, then each of the partners would have to be paid rateably according to his capital; and if, on the other hand, the debts referred to in this clause were not, as I think they were not, meant to include the capitals of the partners, then what is the meaning of the words "according to their respective shares and interests therein?" It was said for the Appellant that these words mean shares and interests in the assets, and not in capital. But surely the capitals of partners in a partnership cannot be

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considered otherwise than as interests in the assets of the partnership. They, in fact, constitute the principal interests which the partners have in the partnership after its dissolution; besides, the 10th clause of the articles providing for the accumulation of the capital by means of the profits, seems to me to go far to explain the meaning of these words. It is to be observed, too, that if the intention had been such as is contended for by the Appellant, it can hardly be supposed that this 21st clause of the articles would have been framed as it is. It would have been more apposite, and quite as easy to have met that view by saying that after payment of the debts, and of the excess of the Defendant's capital, the surplus should be divided equally between the partners. I may add, that there is nothing, as it seems to me, unreasonable in this construction of the articles. During the continuance of the partnership, the Plaintiff's larger share of the labour might well be set against the Defendant's larger share of the capital, and the risk of profit and loss be therefore equally divided. But upon the determination of the partnership, a new state of circumstances would arise, and new provisions might well be introduced for meeting it. For these reasons I agree, as I have said, with the Master of the Rolls upon this part of the case.

But as to the other question, the rights of the Defendant in respect of moneys which were brought by him into the partnership, and were not derived from the accumulation of profits, I think the Defendant has a better case. These moneys ought, I think, to be considered as loans to the partnership, and as debts due from it, for by the 9th article they are treated as loans, and the interest upon them is to be paid before any other payment of interest is to be made.

Upon the whole case, therefore, my opinion is, that according to the true construction of these articles, the assets of the partnership, after payment of what may be called the outside debts, ought to be applied in payment to the Defendant of the moneys which I have last mentioned, with any interest which may be due upon them, and that the surplus ought to be divided between the partners according to the declaration contained in the decree of the Master of the Rolls. The parties may probably be able, of course without prejudice to any further appeal, to arrange an

order upon the footing which I have mentioned; but if not, I fear the case must go back to the Chief Clerk for further inquiry.

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SIR J. L. KNIGHT BRUCE, L.J., concurred.

Solicitor for the Plaintiff: Mr. *H. H. Lawrence.*

Solicitors for the Defendant: Messrs. *Wilde, Rees, Humphry, & Wilde.*

HUME *v.* POCOCK.

L. JJ.
1866.
March 22, 23;
April 17, 18.

Specific Performance—Vendor and Purchaser—Stipulation as to Title—Misrepresentation.

The Plaintiff agreed to sell to the Defendant all his estate, right, and interest in certain lands, the Plaintiff only to produce a title from *A. B.* (the last owner) to himself. It appeared that the Defendant knew that *A. B.* was one of four supposed owners of the property, and was anxious to buy up such title as he had in order to get rid of his opposition to a bill in Parliament:—

Held (affirming the decree of *Stuart*, V.C.), that the Defendant was not at liberty to shew *aliunde* that *A. B.* had no title, and that the Plaintiff was entitled to specific performance.

The mere assertion by the vendor that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract.

THIS was an appeal from a decree of Vice-Chancellor *Stuart* (1).

The bill was filed for specific performance of an agreement for the sale of certain waste mudlands in *Thorney*, near *Chichester Harbour*. The Defendant, *Thomas Pocock*, in the year 1858, was engaged with one *Thomas Kingdon* in promoting a bill in Parliament for the purpose of embanking and reclaiming a tract of land of which these mudlands formed part. The bill was thrown out in that year, but was again brought forward in 1859.

Lord *Fitzhardinge*, then Admiral Sir *Maurice F. F. Berkeley*, as lord of the manor and hundred of *Bosham*, claimed to be entitled to the mudlands in question. In the book of reference deposited in Parliament, the lands were described as shore mud-

(1) Law Rep. 1 Eq. 423.

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lands and creeks, and the reputed owners were stated to be Sir *M. F. F. Berkeley*, claiming to be lord paramount of the hundred of *Bosham*; *F. Padwick*, and Sir *C. Taylor*, Bart., claiming to be lords of the manor of *West Thorney*, *Thorney Beckley*, and *Thorney Aglands*; the Lords Commissioners of the Admiralty, the Crown, and the Commissioners of Woods and Forests.

On the renewal of the application to Parliament, in 1859, Admiral *Berkeley* threatened to oppose the bill, and presented a petition to Parliament for that purpose. In this state of things it was arranged, at the suggestion of *Kingdon*, that the Plaintiff, *Robert Hume*, should purchase Admiral *Berkeley's* interest in the lands, and should resell it to the promoters of the scheme at an advanced price, the difference being a consideration to the Plaintiff for his trouble.

Accordingly an agreement was executed on the 2nd of June, 1859, between Admiral *Berkeley* and the Plaintiff, whereby Admiral *Berkeley* agreed to withdraw his opposition, and use his best endeavours to procure the bill to pass, and to sell his interest in the land to the plaintiff for £2000.

On the following day, the 3rd of June, the agreement which was the subject of the present suit was made between *R. Hume* of the one part, and *Kingdon* and the Defendant *Pocock* of the other part, and was in these terms:—

"Whereas Admiral *Berkeley*, by certain grants from the crown, is lord of the hundred and manor of *Bosham, Sussex*; and whereas the said *T. Kingdon* and *T. Pocock* applied last session for an Act to enable them to enclose and reclaim part of the lands situate in *Chichester Harbour*, and part of which lands are within the said hundred and comprise the lands between high and low water mark; and whereas the Lords of the Admiralty caused a report to be made that the said Act should not be granted; and in consequence, by the sudden termination of the session of Parliament, the said Act was stopped, and the right of the undertakers thereof in the present session reserved; and whereas the said *R. Hume* hath agreed with the said Admiral *Berkeley* for the purchase of all his estate, right, title, and interest in the mudlands or lands within the said hundred between high and low water mark, except such part as lies in *Bosham Creek*.

Now the said *Robert Hume* doth hereby agree with the said *Thomas Kingdon* and *Thomas Pocock*, that the said *Robert Hume* shall and will use his utmost endeavours to procure the said bill to pass into an Act; that in the event of the said Act of Parliament being obtained, he, the said *Robert Hume*, shall and will sell to the said *Thomas Kingdon* and *Thomas Pocock* all his estate, right, and interest in all such parts of the said lands between high and low water mark as are within the hundred of *Bosham*, and are included in the lands proposed to be redeemed and embanked under the said intended Act of Parliament, at the sum of £3050. And it is agreed that the said purchase shall be completed within two years from the passing of the Act, and that the sum of £3050 shall bear interest at the rate of £5 per centum from the 9th day of April last; that the said *Robert Hume* shall be called upon to produce only the title from Admiral *Berkeley* to himself; that such sum of £3050 and interest shall be a charge upon the said land so inclosed; that in the event of the bill not passing into an Act of Parliament, this agreement shall be void."

The agreement was prepared by Mr. *Padwick*, who appears to have acted as agent for both parties.

Lord *Fitzhardinge* withdrew his opposition, and the bill passed. The Defendant, having purchased the interest of *Pocock* in the undertaking, commenced operations, and drove piles in the lands, but refused to complete the purchase on the ground of want of title in Lord *Fitzhardinge*.

The Plaintiff accordingly filed the present bill for specific performance of the agreement, relying on the clause in the contract which precluded the purchasers from calling for Lord *Fitzhardinge's* title. The Defendant contended that he was entitled to prove *aliunde* that Lord *Fitzhardinge* had no interest, and tendered evidence for that purpose. He also alleged that he was led to enter into the agreement by the misrepresentations of *Padwick* respecting Lord *Fitzhardinge's* title. The circumstances of the case and the nature of the evidence are more fully stated in the previous report.

The Vice-Chancellor refused to admit the evidence as to Lord *Fitzhardinge's* title, considering that the Defendant was precluded by the contract from questioning it: and he decreed specific

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performance of the agreement. From this decision the Defendant appealed.

Mr. *Malins*, Q.C., and Mr. *Fry*, for the Plaintiff:—

We rely upon the clause in the agreement that the vendor shall only be called on to produce the title of Admiral *Berkeley* to himself. This is not like the ordinary case of a vendor professing to sell with an indefeasible title; the purchasers knew that there were adverse claimants, and the contract was for such interest as the vendor had. The object of the parties was to get rid of Lord *Fitzhardinge's* opposition, and they therefore bought up his claim among others: *Spratt* v. *Jeffery* (1), *Freme* v. *Wright* (2), *Duke* v. *Barnett* (3), *Hanks* v. *Palling* (4), *Wilmot* v. *Wilkinson* (5). We do not admit that Lord *Fitzhardinge* had a bad title, but we object to any evidence on the question being admitted.

There is no proof of misrepresentation in the case. *Padwick* was agent for all parties to draw up the agreement, but he was not the agent of the Plaintiff to make any representation as to the title. If any misrepresentations were made they did not give occasion to the contract, and a misrepresentation will not avoid an agreement unless it *dat locum contractui*. Here the object of the purchasers was to buy up Lord *Fitzhardinge's* claim, and was quite independent of the validity of his title.

Mr. *Bacon*, Q.C., and Mr. *Macnaghten*, for the Defendant:—

It is well settled that where there is a stipulation in a contract that the vendor shall not be called on to produce a portion of his title, the purchaser may show *aliunde* that the title is bad *Shepherd* v. *Keatley* (6) is directly in point. And the principle is recognised in *Darlington* v. *Hamilton* (7), and *Warren* v. *Richardson* (8). We therefore tender evidence to shew that Lord *Fitzhardinge* had no title whatever, and that there was a complete failure of consideration.

(1) 10 B. & C. 249.
(2) 4 Madd. 364.
(3) 2 Coll. 337.
(4) 6 E. & B. 659.
(5) 6 B. & C. 506.
(6) 1 C. M. & R. 117.
(7) Kay 550.
(8) You. 1.

Mr. *Malins* objected to the admission of the evidence.

THE LORDS JUSTICES allowed the evidence to be read *de bene esse* subject to any question as to its admissibility.

Mr. *Bacon* and Mr. *Macnaghten*:—

We also contend that the Defendant was led into the contract by the representations of *Padwick* with respect to Lord *Fitzhardinge's* title. It was in consequence of these representations that the Defendant gave so high a price. The other claimants whose titles were known to be doubtful were treated with on much lower terms. If we shew that the Plaintiff had no title, he has nothing to convey to us, and his bill is for a mere money demand, which the Court will not entertain. The contract is at all events ambiguous, and for that reason the Court will not enforce it, but will leave the Plaintiff to his remedy at law: *Harnett* v. *Yeilding* (1).

SIR G. J. TURNER, L.J., after reading the agreement, continued:—

It is clear upon the face of this agreement that it was entered into with reference to the passing of the Act of Parliament, and to the claim of Sir *Maurice Berkeley*, afterwards Lord *Fitzhardinge*. It was important to Messrs. *Pocock* and *Kingdon* to remove any objection which might arise from the influence of Lord *Fitzhardinge* being exercised in obstructing the passing of the Act of Parliament; and, looking at the terms of the agreement by which Mr. *Hume*, the purchaser from Lord *Fitzhardinge*, stipulated that he would use his utmost endeavours to procure the bill to pass into an Act, and to the clause that in the event of the bill not passing into an Act the agreement should be void, it cannot, I think, be doubted that the agreement was entered into with a view to remove the obstruction which Lord *Fitzhardinge's* influence might create to the passing of the Act. Such, then, being the purpose of the agreement, we must consider the terms of it. It recites that *Hume* had agreed with Lord *Fitzhardinge* for the purchase of all "his estate, right, title, and interest" in

(1) 2 Sch. & Lef. 549.

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the mudlands, and *Hume* agrees that he will, in the event of the Act of Parliament being obtained, sell to *Kingdon* and *Pocock* all his "estate, right, and interest" in such parts of those lands as are included in the lands proposed to be redeemed. The "estate, right, and interest" of *Hume* which is here mentioned must, I think, be referred to the estate, right, and interest which he was to acquire under the contract with Lord *Fitzhardinge*. Then what is the contract with Lord *Fitzhardinge?* It is for the purchase of all his "estate, right, title, and interest." That might mean one of two things—either that Lord *Fitzhardinge* had an estate, right, title, and interest, which was to be conveyed by him to *Hume*, and by *Hume* to *Kingdon* and *Pocock*, or that *Kingdon* and *Pocock* would purchase from *Hume* such estate, right, title, and interest as had been conveyed to him by Lord *Fitzhardinge*. And all doubt upon the meaning of it seems to me to be removed by the clause in the agreement which says that *Hume* shall be called upon to produce only the title from Lord *Fitzhardinge* to himself; that is to say, such title as Lord *Fitzhardinge* had conveyed or could convey to *Hume*, *Hume* was to produce to *Pocock*. If Lord *Fitzhardinge's* conveyance passed nothing, then nothing could pass by the conveyance from *Hume* to *Pocock;* but *Pocock* was still to take the conveyance and to pay the £3050 for the purchase, which he might well do, and had an interest in doing, for the effect of his doing so was to remove any obstruction to the passing of the bill which might arise from Lord *Fitzhardinge's* opposition to it.

It was objected in the course of the argument that the case, in truth, resolved itself into a case of a mere money demand. The Defendant, it was said, has shewn that there was no title from Lord *Fitzhardinge* to be acquired under the agreement, and therefore there would be nothing more to be done than to pay the £3050, and it was argued that the case ought therefore to be dealt with by leaving the Plaintiff to his remedy at law. But that objection is entirely put aside by the term of the agreement, that the £3050 shall be a charge upon the lands to be inclosed. If the Defendant does not pay the £3050, the Plaintiff will get in this Court what he could not get in a Court of Law—a charge upon the property for the £3050. Upon the construction of the

agreement I have not, throughout the case, felt any doubt, but I watched the arguments carefully to see whether my opinion was well-founded; and in the result I adhere to the opinion, which appears to me to be the right one, that this was simply a contract on the part of Messrs. *Kingdon* and *Pocock* to purchase such right, title, and interest as Lord *Fitzhardinge* had, or might have, in the mudlands.

Another answer which was attempted to be given to this bill was, that this contract was entered into upon representations made by Mr. *Padwick*, as the agent of Lord *Fitzhardinge*, that Lord *Fitzhardinge* was entitled to the mudlands in question, and that those representations were proved on the part of the Defendant to be unfounded. Now, that amounts, in my view of the case, to nothing more than this—that the Defendant, in entering into the contract, chose to take the representations of the agent of the vendor that the vendor's title was good. I can conceive cases in which, upon its appearing that there was no foundation whatever for such representations, the representations might be considered fraudulent, and a contract entered into on the faith of them might be held to be one which this Court would not enforce. But the question in such cases must, as I apprehend, be, were or were not the representations fraudulent, and known to be fraudulent at the time when they were made? I see no trace throughout this case of anything shewing that at the time the contract was entered into Mr. *Padwick* believed that Lord *Fitzhardinge* had no title whatever to this property. Then, if a party chooses to take the representations of an agent for the vendor, that the vendor has a good title, I cannot say that the mere fact of his trusting to the representation of the agent of the vendor can amount to such a case of fraud as will absolve him from the contract. But how does this case really stand? It is in evidence that Lord *Fitzhardinge* had for years claimed to be entitled to these mudlands; and how then can it be said that the representations which were made by *Padwick* were fraudulent, and that the Defendant was so deceived by those representations as to enter into this contract, he having an interest, it must be remembered, in removing Lord *Fitzhardinge's* claim. I believe that he was induced to enter into the contract, not by

L. JJ. 1866 HUME v. POCOCK.

the representations, but by the difficulty which might have been thrown in the way of the passing of his bill. I think the decree of the Vice-Chancellor is perfectly right, and that the appeal must be dismissed with costs.

Sir J. L KNIGHT BRUCE, L.J. :—

My view of the matter is the same in thinking that there is a total absence of proof of any fraud. It appears to me that the question decided by the Vice-Chancellor as to the admissibility of the evidence may remain undecided. I think it is not necessary to give an opinion upon that point, and that it should remain an open question. How that had better be expressed will be a matter for consideration.

Ultimately no variation was made in the Vice-Chancellor's decree respecting the admission of the evidence, and the appeal was altogether dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Baxter, Rose, Norton, & Co.*

Solicitors for the Defendant: Messrs. *Chilton, Burton, Yeates, & Hart.*

In re KAYE.

L. JJ.
1866
April 17.

Infants' Guardian.

Three applications were made at the same time as to the guardianship of infants. One that Mrs. *H.*, their maternal grandmother, might be appointed guardian; another for the appointment of Mrs. *A.* and Mrs. *B.*, their paternal aunts, both married women; and another for the appointment of *C.*, a friend of the family. An order having been made by *Stuart*, V.-C., for appointing Mrs. *B.* sole guardian:—

Held, on appeal, that though the discretion of the Judge as to the choice of a guardian ought not to be interfered with, except on very strong grounds, yet that this order ought to be discharged, and Mrs. *H.* and *C.* appointed guardians, on these grounds:—that the appointment of a married woman to be sole guardian was improper; that the Vice-Chancellor had not approved of Mrs. *A.*, which had a bearing on the propriety of appointing Mrs. *B.*, who was acting with her; that the father had in his lifetime shewn great confidence in Mrs. *H.*, and allowed the children, who had very little intercourse with his relations, to live much with her; and that their mother, whose wishes, though she had no power to appoint guardians, ought to be taken into consideration, had made a will purporting to appoint Mrs. *H.* and *C.* guardians.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Stuart*.

Henry Kaye died on the 31st of January, 1865, leaving four infant children. He left a will bequeathing his property to his wife for life, and after her death to such of his children as being sons or a son should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, with no gift over. The will contained powers of maintenance and advancement, but no appointment of guardians.

The testator's widow died in the following November, leaving a will made in the previous August, by which she purported to appoint *John Brownbridge*, and her mother, *Sarah Hirst*, guardians of the children.

The property of the infants produced about £80 a-year.

On the 9th of January, 1866, a summons was taken out in the name of the infants by the above-named *Sarah Hirst* as their next friend, asking that she might be appointed guardian, and a sum not exceeding £80 be allowed for their maintenance.

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Before this, on the 21st of December, a summons had been taken out by *John Furness* as next friend, asking for the appointment of the two paternal aunts of the infant, namely, *Jane*, the wife of *John Atkinson*, and *Lucy*, the wife of *E. P. Boothroyd*, as guardians, and for an allowance for maintenance.

A third summons was taken out by *John Brownbridge* on the 26th of January, asking that he might be appointed guardian, and for an allowance for maintenance.

A considerable amount of evidence was adduced as to the qualifications of the several parties proposed as guardians. No personal exception was taken to Mrs. *Boothroyd*, the only objection alleged being that her husband was a confirmed invalid, and that she had a large family of children and straitened means. Evidence was adduced to shew that Mrs. *Atkinson's* husband was a drunkard and in the habit of using violent language. As regards Mrs. *Hirst*, evidence was adduced as to her having no means of her own. On the other hand, strong evidence was adduced as to her respectability and as to the affection she had shewn to the children, who during the father's life used very frequently to stay with her, and since the father's death she had had almost the exclusive care of the two younger. Mr. *Brownbridge* was not related to the infants, but had shewn a kind interest in them, and had induced a schoolmaster to undertake the education of the eldest boy on very advantageous terms.

The eldest child was a girl thirteen years of age. The other three were boys, aged respectively ten, six, and four.

Vice-Chancellor *Stuart* dismissed the first and third of the three above-mentioned summonses, and upon the second (that taken out by *John Furness*) made an order appointing Mrs. *Boothroyd* sole guardian of the persons of the infants. The infants, by Mrs. *Hirst* as next friend, now moved that this order might be discharged, and an order made according to the first-mentioned summons.

Mr. *Bagshawe*, for the appeal motion :—

The appointment of a married woman as sole guardian is unprecedented, and, it is submitted, cannot be supported. The confidence placed by the father in Mrs. *Hirst*, and the express

wish of the mother that she and Mr. *Brownbridge* should be appointed guardians, make the appointment of them jointly the most desirable step.

Mr. *Buchanan*, contrà:—

The Vice-Chancellor has exercised his discretion on the subject, and this Court will be unwilling to interfere with it. The relations *ex parte paternâ* are *primâ facie* the most proper to be appointed guardians, and nothing is alleged against Mrs. *Boothroyd*, who has been appointed.

Mr. *Bagshawe*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

I agree with the Lord Justice in thinking that, if the matter were originally before us, the appointment of Mrs. *Hirst* and Mrs. *Brownbridge* to be guardians would be the most proper appointment. The main difficulty I have felt is, that we are called upon to interfere with the discretion of a learned Judge, in a matter where the discretion of a Judge ought not to be interfered with, except for strong reasons. In my opinion, however, the difficulty is not insurmountable, for the appointment of a married lady to be sole guardian raises a difficulty in the way of supporting the order under appeal, which, in my judgment, cannot be surmounted. I think, therefore, that the matter ought to be dealt with as we should have dealt with it if coming before us originally, and that Mrs. *Hirst* and Mr. *Brownbridge* ought to be appointed guardians under proper conditions.

SIR G. J. TURNER, L.J.:—

I also feel reluctant to interfere with the discretion of the Vice-Chancellor, but I think that the circumstances of the case render such interference desirable. The opinion of the Vice-Chancellor appears to have been unfavourable to Mrs. *Atkinson*, since, upon an application to appoint her and Mrs. *Boothroyd* joint guardians, His Honour has appointed Mrs. *Boothroyd* sole guardian. This is a circumstance of some importance, for it is evident that Mrs. *Atkinson*

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and Mrs. *Boothroyd* are acting together, and anything which affects the expediency of appointing one of them, has a bearing on the expediency of appointing the other. It is clear that the father placed great confidence in Mrs. *Hirst* during his life; the children often stayed with her, especially when he was from home, and they had comparatively little intercourse with his relations; it is therefore to be supposed that his wish would have been for the children to live with her rather than with his sisters. The fact that the mother, by her will, named Mrs. *Hirst* and Mr. *Brownbridge* to be guardians, is another important circumstance; for, although a mother has no legal power to appoint guardians, still, where the father has expressed no wish, the Court will regard her wishes as deserving of great attention. I am satisfied that it will be best for the children that Mrs. *Hirst* and Mr. *Brownbridge* should be appointed guardians, upon their giving proper undertakings as to the education of the children, and as to allowing the father's relations opportunity of access to them.

Solicitors: Messrs. *Van Sandau & Cumming;* Messrs. *Lever & Son;* Messrs. *Underhill & Field.*

L. JJ. 1866 *April* 17.

FRYER *v.* DAVIES.

Vacating Enrolment.

A decree dismissing a bill was taken to the registrar on Friday by the Plaintiff's solicitor to be passed and entered, and by arrangement was left with the Defendant's solicitor to pass and enter on behalf of the Plaintiff. The Plaintiff's solicitor asked for it at the office on the following Wednesday, but it was not to be found, the fact being that the Defendant's solicitor had obtained it from the office; and the Plaintiff's solicitor could not hear of it till Saturday, when he was informed by the Defendant's solicitor that he had taken it from the entering clerks, and enrolled it:—

Held, that as the decree ought not to have been delivered to any one except the solicitor who left it, and the irregularity had delayed the Plaintiff in proceeding to an appeal, the enrolment ought to be vacated.

THIS was an application by the Plaintiff to vacate the enrolment of a decree dismissing his bill.

The decree was pronounced on the 16th of January, and the minutes were delivered out by the registrar on the 29th. Upon the Plaintiff's solicitor informing the registrar that the Plaintiff had determined to appeal, he stated that the Plaintiff would have the settling and passing of the decree. Some delay took place in making out the list of evidence, but ultimately, on the 6th of March, the minutes were settled, and the Plaintiff's solicitor paid the stamp on the decree. On Friday, the 9th of March, the parties met before the registrar for the purpose of passing the decree; but owing to a set of admissions having been mislaid by the clerk of the Defendant's solicitor, the clerk of the Plaintiff's solicitor left the original order with the Defendant's solicitor, who promised to search for and file the missing admissions, and pass and enter the decree. The Defendant's solicitor, on the following day, found and filed the admissions, and left the original order with the registrar to be passed and entered. On the Wednesday following, the Plaintiff's solicitor applied at the entering clerk's seat for the decree, but it could not be found, the fact being that the clerk of the Defendant's solicitor had asked for it at the office and taken it away; and the Plaintiff's solicitor could not obtain any tidings of it till he mentioned the matter to the Defendant's solicitor on the 17th, when he informed him that he had taken it and enrolled it.

It appeared that the practice in the office was only to deliver a decree to the solicitor whose name was indorsed thereon, or to his clerk. The Plaintiff's solicitor deposed that, having been prepared to appeal at once, he had considered it unnecessary to enter a caveat; and that, if the decree had not been missing, he should have presented the Petition of appeal at once. The clerk of the Defendant's solicitor deposed that he considered that he was acting regularly in asking for the decree, since it was he who had left it; and that if the officer had declined to give him the original, he should have obtained an office copy and effected the enrolment.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the application, contended that the Defendant's solicitor had gained an advantage by irregularity in such a way that though he might have no intention of acting

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improperly, he must be treated as guilty of *mala fides*. They referred to *Hill* v. *South Staffordshire Railway Company* (1).

Mr. *Beavan* for the Respondent:—

In order to vacate an enrolment, there must be a case of *mala fides*, or deception, or a strong case of surprise: *Williams* v. *Page* (2); *Wildman* v. *Lade* (3). Here there was nothing but despatch. The Plaintiff ought to have filed a caveat, or taken an office copy and appealed at once.

SIR J. L. KNIGHT BRUCE, L.J.:—

The mere fact of the delivery of the decree without authority to a person not entitled to receive it, which materially interfered with the Plaintiff's proceedings, is, in my judgment, a sufficient ground for vacating the enrolment.

SIR G. J. TURNER, L.J.:—

I am of the same opinion. It was the duty of the entering clerk not to deliver the decree except to the person from whom he received it. Here he had actually received it from the Defendant's solicitor, but under such circumstances that the Defendant's solicitor can only be considered to have left it with him on behalf of the Plaintiff. I do not impute any wrong intention, but there was an irregularity on the part of the Defendant's solicitor which delayed the Plaintiff's proceedings, and of which the Defendant cannot be allowed to take advantage.

Solicitor for Plaintiff: Mr. *T. Martin.*
Solicitors for the Defendant: Messrs. *Terrell & Chamberlain.*

(1) 2 D. J. & S. 230. (2) 1 De G. & J. 561.
(3) 4 De G. & J. 401.

Ex parte BLENCOWE.

In re BLENCOWE.

L. JJ.
1866
April 27.

Bankruptcy—Bankruptcy Act, 1861 (24 & 25 *Vict.* c. 134)—*Petitioning Creditor's Debt—Decree of a Court of Equity.*

The obligation to pay a sum of money under an order of a Court of Equity is merely an equitable debt, notwithstanding the 18th section of 1 & 2 Vict. c. 110, and cannot be made the ground of a Petition for adjudication in bankruptcy.

THIS was an application by *John Preston Blencowe*, to annul an adjudication of bankruptcy which had been made by Mr. Commissioner *Winslow* in London, on a Petition presented on the 1st of January, 1866.

The debtor relied on several grounds for annulling the adjudication, but the only objections to its validity which require a report, related to the nature of the petitioning creditor's debt, which the debtor alleged was insufficient to support the Petition.

The facts were shortly as follows: The debtor, with two other persons, named *Partridge* and *Inglis*, were appointed trustees of a marriage settlement, dated the 14th of February, 1837. On the 30th of April, 1857, the trustees invested a sum of £8000, part of the trust funds, on mortgage of an estate in *Wales*, which proved an insufficient security. In February, 1863, a bill was filed by the children of the marriage against *Partridge* and *Blencowe*, charging them with a breach of trust in not taking sufficient care to ascertain the value of the security, and seeking to make them liable for the loss.

By an order made by the Master of the Rolls on the 20th of February, 1865, it was declared that *Partridge* and *Blencowe* were jointly and severally liable to make good the sum of £8000 to the estate. And it was also ordered that *Blencowe* should pay to *Pleasance Inglis*, the tenant for life, the sum of £390, by way of interest on the sum of £8000 from the 30th of October, 1864, to the 31st of January, 1866, in four instalments of £97 10*s.* each, to be paid upon the 30th of April, the 30th of July, the 30th of

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October, 1865, and the 31st of January, 1866. *Blencowe* paid the first instalment, but made default in the second and third: and these two instalments formed the debt of the petitioning creditor, upon which the adjudication was founded.

Blencowe was not a trader, and was residing abroad at the time when the Petition was presented. He applied to the Commissioner to annul the adjudication on the grounds, among others, that the petitioning creditor's debt was contracted before the passing of the Act of 1861, and therefore could not support the Petition under the 90th section of the Act, and also because it was merely an equitable debt. The Commissioner having refused the application, it was renewed before the Court of Appeal.

Mr. *De Gex*, Q.C., with whom were Mr. *Sargood* and Mr. *Hannen*, for the Applicant:—

The Commissioner held that the debt was founded upon the decree in Chancery, and was therefore subject to the Act, proceeding upon the authority of *Ex parte Harding* (1), but that case has been reversed in the House of Lords: *Williams* v. *Harding* (2). It is clear from that case, as well as from principle, that the obligation to pay the sum of £8000 dates from the breach of trust, and the obligation to pay interest is a continuance of the original contract.

But if the debt arises from the order it is merely an equitable debt. It was well established before the passing of the 1 & 2 Vict. c. 110, that a decree of a Court of equity for payment of a sum of money founded on an equitable demand, would not sustain an action at law, and therefore could not be made the foundation of a Petition in bankruptcy: *Carpenter* v. *Thornton* (3); *Ex parte Stevenson* (4). The last-mentioned statute made no alteration in the effect of decrees in equity in this respect. They were only put on the same footing as judgments for the purposes of the Act (section 18). The same observation has been held applicable to rules of Courts of common law, which are classed with decrees in equity in that statute. They have not the effect of judgments for all purposes, and no action can be brought upon them: *Newton* v.

(1) 12 W. R. 630.
(2) Law Rep. 1 H. L. 9.
(3) 3 B. & A. 52.
(4) 1 Mont. & M. 262.

Boodle (1); *Farmer* v. *Mottram* (2); *Hookpayton* v. *Bussell* (3); *Chitty's Archbold* (4).

Mr. *Bacon*, Q.C., Mr. *Bagley*, and Mr. *G. Taylor*, for the petitioning creditor:—

The liability to make good the trust fund may have commenced when the breach of trust was created; but the relation of debtor and creditor was not constituted till the decree of the Master of the Rolls. In *Ex parte Harding* the order of the Court, winding-up the company, was made before the passing of the Act, and the order for calls was merely enforcing that liability. But the debt in this case arose from the nonpayment of instalments of interest, which is a distinct debt from the principal, and did not accrue before the interest became due.

Secondly, the Act of the 1 & 2 Vict. c. 110 entirely alters the law of debtor and creditor; and one of the express alterations is that a decree of a Court of equity is to be put on the same footing as a judgment at common law.

SIR J. L. KNIGHT BRUCE, L.J.:—

On one or other of the grounds alleged, I am of opinion that this adjudication must be annulled.

SIR G. J. TURNER, L.J.:—

I am also of opinion that the adjudication must be annulled: and I rest my opinion on the ground that this is merely an equitable debt.

Solicitors for the Debtor: Messrs. *Lawrance, Plews, & Boyer.*
Solicitors for the Creditor: Messrs. *Terrell & Chamberlain.*

(1) 18 L. J. (C. P.) 73.
(2) 6 Man. & G. 684.
(3) 9 Ex. 279.
(4) Pp. 1595, 1608, 12th ed.

L. C.
and L. JJ.

1865-6

Dec, 11, 12, 1865:
April 21, 1866

IVIMEY *v.* STOCKER.

Tinbounders—Prescription—Easement.

A mine had from before the time of living memory been worked by tinbounders, according to the custom of *Cornwall*, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had from before the time of living memory used for the purpose of their works the water of an artificial watercourse arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed by *Kindersley*, V.C., on the ground that there was no privity of estate between the owner and the bounders, and that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it:—

Held, on appeal, that an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine as well as with the bounders.

THIS was an appeal by the Plaintiffs from a decree of Vice-Chancellor *Kindersley* dismissing their bill, which was filed to restrain the Defendants from intercepting the flow of a certain stream of water to the Plaintiffs' mines.

The Plaintiffs were the owners in fee of certain ancient tin mines, called the *Beam Mine*, *Little Goodluck Tinwork*, and *Pitmoor Tinwork*, in *Cornwall*. These mines were supplied with a large part of the water necessary for working them by the stream in question, which arose at a spot about half a mile from the *Beam Mine*, upon lands of the Defendant, Mr. *Pascoe*, and after passing through certain pools, or reservoirs, called *St. Andrew's Pools*, also situate on Mr. *Pascoe's* land, entered the *Beam Mine*, which was at a short distance from the boundary of his estate, and then ran on to the other two mines. There was a mass of conflicting evidence as to the nature of this watercourse; the result appeared to be that it was an artificial one. But it was clearly shewn that it had been in existence before the time of living memory. There was a conflict of evidence as to whether the water came from a natural spring, or from the drainage of mines,

but it had flowed uninterruptedly along this watercourse for a great number of years. The watercourse appeared to have been made with a view of supplying the Plaintiffs' mine with water, as the water would in its natural course have run in quite another direction.

From before the time of living memory, the *Beam Mine* had been worked by tinbounders under a *Cornish* custom, according to which, if the owner of mines under waste lands does not choose to work them, any person willing to do so may mark off a plot of the waste land, and work the mines under it without the consent of the owner, yielding to the owner a certain proportion of the ore gotten. The bounders, from before the time of living memory, had enjoyed the use of the water of the stream in question for their operations. In 1856 the mine ceased to be worked by bounders; the owners took possession, and it was now worked by their licensees.

It is not uncommon for bounders, instead of themselves working the mines which they have bounded, to let them out to other persons. In the present case Mr. *Pascoe* had for some time, it did not appear how long, been one of a body of adventurers by whom the *Beam Mine* was worked under the bounders.

The only question of law in the cause was whether in these circumstances the Plaintiffs could claim a prescriptive right to the water in respect of the *Beam Mine*. As regarded the two other mines, the question was merely one of fact, whether an enjoyment of the easement by the Plaintiffs and their licensees, sufficient to create a prescriptive title, was established by the evidence.

In 1864 the Defendant, Mr. *Pascoe*, for the purposes of works belonging to himself and the other Defendants, diverted the whole of the stream before it reached the *Beam Mine;* and the present bill was filed. Vice-Chancellor *Kindersley* held that the Plaintiffs had not established their right to the easement, inasmuch as the bounders did not derive their estate from the owners of the land, and the owners, upon the bounders ceasing to work, did not come in as of any estate or interest which the bounders had. His Honour considered that the owners therefore could not claim by prescription on account of the enjoyment by the bounders, inasmuch as the owner, to support such a claim, must establish that

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he and those whose estate he now has, have, from time whereof the memory of man runneth not to the contrary, enjoyed the easement claimed. His Honour accordingly dismissed the bill with costs.

Mr. *Baily*, Q.C., Mr. *Phear*, and Mr. *Pinder*, for the Plaintiffs, in support of the appeal:—

The nature of the custom of tin bounding is shewn in *Rogers* on Mines (1), and *Rogers* v. *Brenton* (2). The bounders acquire a right to work, but the lord remains owner and receives a compensation. It has been decided in the cases that the lord is in actual possession because he does not receive a money payment but a part of the actual produce: *Rogers* on Mines (3), and cases there cited. The expression in one case is that "the lord is working by the adventurers." If this be the true view, the right which the bounders indisputably had to the flow of water, was acquired by the lord as an owner in possession; but if not, the bounders must be considered as licensees, and the right acquired enures for the benefit of the estate. The rule as to prescription is laid down in *Cruise's* Digest (4). "A prescription in a *que* estate must always be laid in the person who is seised of the fee simple." A prescriptive right therefore must run with the land. The bounders could not prescribe for themselves as they had only a chattel interest, moreover they have only an incorporeal hereditament: *Rowe* v. *Brenton* (5), and a person having only an incorporeal hereditament cannot prescribe: *Doe* v. *Wood* (6); *Doe* v. *Alderson* (7); *Rogers* v. *Brenton* (2); *Co. Litt.* (8); which is also shewn by the forms of pleading: *Attorney-General* v. *Gauntlett* (9); *Chitty's* Pleading (10). But surely if an easement has been uninterruptedly enjoyed for centuries there must be a right to it somewhere, and their right can be nowhere but in the land, or it could not be enjoyed by different sets of bounders in succession who have no privity with each other. The authorities are clear that prescription must be on behalf of the owner of the fee: *Rogers* v. *Brenton* (2); *Barwick*

(1) P. 347.
(2) 10 Q. B. 26, 50.
(3) P. 515.
(4) iii. 422.
(5) Concanen's Rep. p. 80.
(6) 2 B. & A. 724.
(7) 1 M. & W. 210.
(8) 121, *b*.
(9) 3 Y. & J. 93.
(10) Vol. ii. p. 372, 7th ed.

v. *Matthews* (1); *Wms. Saunders* (2); *Codling* v. *Johnson* (3). The Vice-Chancellor proceeded on the ground that there was no privity between the lord and the bounders, but we submit that there is: *Rex* v. *Baptist Mill Co.* (4); *Rex* v. *St. Austell* (5); *Crease* v. *Saule* (6); *Rogers* v. *Brenton* (7). Suppose, however, that there was no privity, it would be a most absurd technical rule to make the right to an easement depend on the relations between the owner and occupier of the dominant tenement. The common-sense rule is that enjoyment by the occupiers attaches the easement to the estate. The Act 2 & 3 Wm 4. c. 71, supports this view, for the preamble shews that it was not intended to alter the principles of prescription, but only to prevent rights from being defeated by shewing that they had commenced later than the reign of *Richard* I., and the form of pleadings given by this Act only alleges enjoyment as of right by the occupiers without taking into account the relations between them and the owners. The Vice-Chancellor appears to have thought that if the bounders had been lessees, we should have had a good case, because the landlord comes into the place of the lessee, but we submit that this is an erroneous view, the lessee could only prescribe in the name of the landlord; if he could prescribe in his own, the landlord could not have the benefit of the prescription, for it would be annexed to the chattel interest only. That the watercourse was artificial makes no difference: *Gale* on Easements (8); *Arkwright* v. *Gell* (9); *Magor* v. *Chadwick* (10); *Wood* v. *Waud* (11); *Greatrex* v. *Hayward* (12); *Beeston* v. *Weate* (13); *Gaved* v. *Martyn* (14). Then the Defendants allege that the easement was extinguished by unity of possession. But Mr. *Pascoe's* acquiring a share in one of the tinbounds could not affect the rights of his co-owners. Moreover acquiring a chattel interest in the dominant tenement only suspends an easement and does not extinguish it: *Gale* on Easements (15); *Thomas* v. *Thomas* (16). The argument of the other side

(1) 5 Taunt. 365.
(2) i. 349, *a*.
(3) 9 B. & C. 933.
(4) 1 M. & S. 612.
(5) 5 B. & A. 693.
(6) 2 Q. B. 862.
(7) 10 Q. B. 26, 50.
(8) 3rd ed. 262—280.
(9) 5 M. & W. 203.
(10) 11 Ad. & E. 571.
(11) 3 Ex. 748.
(12) 8 Ex. 291.
(13) 5 E & B. 986.
(14) 14 W. R. 62.
(15) 3rd ed. 470.
(16) 2 C. M. & R. 34.

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founded on *Warburton* v. *Parke* (1) might have had some weight if we were claiming under Lord *Tenterden's* Act, by reason of an enjoyment for twenty years only, but we claim at common law: *Gale* on Easements (2).

Mr. *Glasse*, Q.C., and Mr. *Charles*, for the Defendants, in support of the decree:—

There is nothing in the argument that the bounders could not prescribe because they had an incorporeal hereditament, their interest is a corporeal chattel interest, for which ejectment will lie: *Vice* v. *Thomas* (3); *Doe* v. *Alderson* (4). The bounders, as is shewn in *Rogers* v. *Brenton*, have a right adverse to the landowner, a right to use his mine against his will; they do not come in under him nor does he on their ceasing to work take their estate. They have an estate by custom independent of him and sufficient to enable them to acquire an easement by prescription for themselves. The grant must be presumed to them, not to the landowner. The passage referred to in *Cruise's* Digest cannot be reconciled with *Co. Litt.*, 113, *b*. The authorities referred to on the other side as to copyholders only prescribing through the lord are not applicable, for they are founded in this, that the copyholder holds at the will of the lord, and a customary freeholder who does not hold at the will of the lord can prescribe in his own name: *Follet* v. *Troake* (5). The reason why lessees cannot prescribe in their own names is that their interest has a certain commencement and termination (6); but a bounder's interest may have continued from time immemorial, so that there is no reason why he should not prescribe in his own name. The bounders may have the right to the water by custom: *Goodday* v. *Michell* (7); *Gateward's Case* (8) does not apply to shew the contrary, for it related to a *profit à prendre*. The lord coming in without privity cannot claim the benefit of the right acquired by the bounders; though we do not dispute that if the bounders were his lessees he could do so. The Plaintiff

(1) 2 H. & N. 64.
(2) 3rd ed. 144, *n*.
(3) Smirke's Report.
(4) *Ibid.* 39.
(5) 2 Ld. Raym. 1186.
(6) 17 Vin. Abr. 287, tit. "Prescriptions, Y. 17.
(7) Cr. Eliz. 441.
(8) 6 Rep. 59.

could not allege his right in the form required at law: *Bullen* and *Leake* Prec. Plead. (1). Then moreover this is not a natural watercourse but an artificial one. Mr. *Pascoe* is under no obligation to continue the flow of water from his old mine: *Gaved* v. *Martyn* (2); *Gale* on Easements (3). The true view of the case is that Mr. *Pascoe's* is the dominant tenement having a right to discharge this water over the land of the Plaintiffs without being bound to do so. *Wood* v. *Waud* (4), *Gale* on Easements (5); and *Briscoe* v. *Drought* (6) shew the nature of the rights in artificial streams of this kind. There is no case in which an obligation permanently to send on an artificial stream has been established. Mr. *Pascoe's* interest in the bounds would extinguish the right, the obligation to send down the water and the right to receive it being in the same person.

Mr. *Baily*, in reply:—

It is plain that this channel was made for the benefit of the mines; if it had been wished merely to get rid of the water of the old mine from which this water is said to come there would have been nothing to do but let it take its natural course, which, according to the evidence, would have been in quite a different direction. The case is quite out of the scope of *Gaved* v. *Martyn*, where the stream was under the control of and discharged solely for the convenience of the person from whose mine it came.

1866, April 21. LORD CRANWORTH, L.C.:—

The Plaintiffs in this case are tenants in common, in fee simple, of three tin mines in the parish of *St. Austell*, in *Cornwall*, called respectively, the *Beam Mine*, *Little Goodluck Tinwork*, and *Pitmoor Tinwork*.

These mines are all worked by persons deriving title by license from the Plaintiffs, to whom they pay certain stipulated rents or royalties.

(1) P. 487, 1st ed.; 682, 2nd ed.
(2) 14 W. R. 62.
(3) P. 262, 3rd ed.
(4) 3 Ex. 748.
(5) P. 274, 3rd ed.
(6) 11 Ir. Com. Law Rep. 250, 269.

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Up to the month of September, 1864, these mines or works were all supplied with water by means of a stream flowing from higher ground in the parish of *Roche*, belonging to the Defendant *Pascoe*, and called the *String Filley Old Stream*. *Pascoe's* land adjoins the *Beam Mine*, and the stream used to enter the *Beam Mine* and from thence to pass first to the *Goodluck Tinwork* and then to the *Pitmoor Tinwork*.

In the month of September, 1864, the Defendants caused a dam to be thrown across the stream in the lands of the Defendant *Pascoe*, at a short distance above the *Beam Mine*, whereby the water was entirely diverted, and ceased to supply any of the Plaintiff's mines and works. It was made to flow to certain china clay works belonging to the Defendant *Pascoe*, and worked by the other Defendants under license from him.

The Plaintiffs filed this Bill on the 8th of October, 1864, against the Defendants, alleging their right to the undisturbed flow of the water in the stream to and through their mines and works, and praying for an injunction, and for damages in respect of the loss which they had sustained from the obstruction. Evidence was gone into on both sides to a great extent, and the sole question for decision was, whether the Plaintiffs had succeeded in shewing that they were entitled by way of easement to the use and enjoyment of the *String Filley Old Stream* for the purpose of their mines. That the water of that stream was of great importance to the Plaintiffs in working their mines could not be disputed, and if therefore they established by their evidence the right which they alleged, they were certainly entitled to the relief they asked by their bill. The Vice-Chancellor, however, thought that the Plaintiffs failed to make out their case, and on a motion for decree, dismissed their bill with costs. Against that dismissal the Plaintiffs have appealed, and the question is whether on the evidence they were entitled to relief.

There are some points which seem to me clear. The three mines in question must be taken as having been ancient mines, by which I mean mines which have been worked for a period going back far beyond living memory, and as to which there is nothing to shew when the workings commenced.

I think it is also proved that for a period beyond living memory

the persons engaged in working these mines have always had the use of the uninterrupted flow of the water in question, and that there is nothing to shew that this was not a right coeval with the working of the mines.

If there had been nothing more than this in the case there could have been no doubt of the Plaintiffs' right to the relief they are seeking. The presumption would have been irresistible, even independently of the statute 2 & 3 Wm. 4, c. 71, s. 2, that the owners of the mines had, either by prescription or grant, acquired a right to the easement of which they had thus been in the enjoyment. But in answer to this case of the Plaintiffs the Defendants relied on several special circumstances in their favour, which, they contended, rebutted the claim of the Plaintiffs. There was some evidence offered on their behalf for the purpose of shewing that the stream in question was a mere modern creation which had not existed long enough to warrant any claim either under or independently of the statute. This, however, was hardly contended for at the Bar, and seems not even to have been noticed by the Vice-Chancellor in his elaborate and considered judgment, of which a copy has been put into our hands. The evidence is irresistible to shew that the stream has, for a period beyond living memory, flowed in the same channel in which it ran previously to the obstruction, and has constantly been used for the purposes of the mines, and the only question therefore is, what are the presumptions which, in point of law or fact, this Court ought to make.

The main ground on which the Defendants relied, and on which alone the Vice-Chancellor rested his judgment, was, that until the year 1856 the *Beam Mine*, which is the highest mine of the three, and which therefore is first supplied with water by the stream, was worked, not by the owners, but by tinbounders. There was a great deal of discussion before us as to the nature of the rights and interests of tinbounders. But for the present purpose it is sufficient to say that by the custom of *Cornwall*, which I assume to be valid and well established, wherever there are tin mines under waste lands, if the owner or lord of these lands does not think fit to work them, any persons willing to do so may, complying with certain rules, mark off a definite plot of the waste land,

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and, without the consent of the owner, work the mines under it, yielding to him a certain proportion of the produce. Up to the year 1856, the *Beam Mine* had, as I have stated, been worked by bounders. When their workings commenced does not appear, but the evidence makes it probable that it was in very remote times. The estate or interest of tinbounders is of an anomalous character. They have a mere chattel, passing to executors, not to heirs, and they lose all their interest if they cease to work the mine. Their title is not derived from the owner of the land, though they are bound to make him a *render* dependent on the quantity of ore raised. In this unusual state of the relation between the bounders, who are practically in possession, and those who have the title to the land and mine, the question arises as to what presumption ought to be made as to any easement which they have enjoyed. Ought it to be considered, in the absence of express proof as to its origin, as a right conceded to them as bounders, or as a right belonging to the land in which they are exercising their customary privilege of taking the ore? If the former presumption ought to prevail, then it may follow as a consequence, that when the bounders cease to work the mine, the right which they had acquired as bounders will no longer exist. If, on the other hand, the presumption to be made is that the right was one incident to, or conferred on the owners of, the land, then the circumstance that it cannot be enjoyed by the same class of persons as had previously profited by it, leaves the rights of the owner of the soil unaffected. In the case of a stream of water flowing in its natural course, and not diverted by the hand of man, this question cannot arise. In such a case there is no room for presumption. The running water in that case in fact forms part of the land bounded. But the case may be different where the stream is not a stream flowing in its original and natural channel, but a watercourse, formed at some unknown time, into which water has been diverted and made to flow by the skill of man. That this was the case as to the stream now in question, seems to me to be tolerably certain from the evidence. And the question therefore is, what, as to such a watercourse, is the presumption we ought to make. Ought we to presume that it was an easement granted to the bounders, or to the owner of the soil? The Vice-Chancellor proceeded on

the assumption that the easement must be regarded as having belonged to the bounders and not to the owner of the soil, and consequently, that it never passed to the Plaintiffs as owners of the mine, for that they are not in any sense assignees of the bounders. The reasoning of His Honour may be thus stated. The rights of the bounders cannot be sustained on the ground of prescription, for to support a right on such a ground, the persons insisting on it must have either in themselves, or in those under whom they derive title, an estate in fee simple, and bounders certainly have no such estate. They must therefore have derived their title by grant to themselves as bounders, and so when they have ceased to be bounders the grant has no longer any operation. It will be observed that the reasoning of His Honour rests entirely on the assumption that the easement in question ought to be treated as an easement belonging to the bounders, and not to the owners of the mine. But, with all deference to the Vice-Chancellor, that is not the presumption which I think ought to be made.

The water of the stream in question appears by the evidence to be very important for the due working of the mine. When the workings first began, they, no doubt, were surface workings, and considering how great the necessity was for the water, there is strong reason to think that no bounding would have taken place, if the stream had not then flowed to and over the land bounded. In that case the right must have been a right of the owner and not of the bounder. But suppose this not to have been the case, suppose the land to have been bounded without the stream, and that afterwards the stream was brought to the lands bounded by some arrangement made with the then owners of the adjoining land in which it takes its rise. The question is whether we ought to presume that such a diversion of the stream was made by arrangement with the bounders or with the owner of the land. I strongly incline to the latter presumption. In the first place, I can find nothing in the custom, as stated in any of the books to which we were referred, which would enable the bounders, *invito domino*, to cause a stream of water to be made to flow over the lands bounded. Such water might be beneficial to the bounders, but might be injurious to the owner of the land. Unless there-

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fore this is expressly authorized by the custom it could only be done by arrangement with the owner, and if so, the probability would be, that what he was consenting to for the convenience of those working the mine should be so secured that, if the workings should be discontinued, he might have the benefit of the arrangement.

Though the bounders do not derive title from the owner of the land bounded, although they have to some extent a title adverse to his, yet, when the workings have commenced, it is his interest that those who are engaged in the work should have the best facilities for obtaining the largest produce, since by the custom he is entitled without cost to a share, generally a fifteenth, of all the ore raised. If therefore it is important that a stream of water should be brought from adjoining lands for the use of the works, which cannot be done without the consent of the owner, the great probability is that any arrangement made for that object in which the owner has an immediate and a possible quasi-reversionary interest should be made with him, and not merely with those who have the comparatively uncertain rights of tin-bounders. I strongly incline, therefore, to think that even if the question was one solely between the Defendant *Pascoe* and the owner of the *Beam Mine*, I should have come to the conclusion that the easement was the right of the owner and not of the bounders.

But here the question is between the Defendants and the owner, not only of *Beam Mine*, but also of the two lower mines or tinworks called *Little Goodluck* and *Tinmoor*. These lower tinworks have never been worked by bounders. They are worked by the Plaintiffs themselves, or, which is the same thing, by adventurers working under license from the Plaintiffs. The obstruction made by the Defendants prevents the flow of water to these lower works as well as to the *Beam Mine*. And coming, as I do from the evidence, to the conclusion that this flow of water through these latter works has continued for a period exceeding that required by the statute, I am of opinion that the owners of them are entitled by way of easement to their continuance.

An argument was addressed to us, founded on the alleged unity of possession by the Defendant *Pascoe*, of the land through

which the water flows, and the mines and works which it serves. The law is clear, that if the same person becomes absolute owner of the land from which a stream of water flows, and also of the land into which it flows, the easement which the latter might have claimed is extinguished, and it was sought to apply that principle to the case now before us. The easement asserted, it was said, is an easement to have a flow of water from the lands in the parish of *Roche* belonging to the Defendant *Pascoe*, to the *Beam Mine*,—but part of the *Beam Mine* is in the parish of *Roche*, and forms parts of the lands there of the Defendant *Pascoe*,—he is, therefore, the owner of part at least of the dominant, and of the whole of the servient, tenement,—he is the owner of the land, bound, so to say, to supply the water, and he is also owner of the lands, or a part of the lands, entitled to insist on that supply being made good. But this is a mere fallacy arising from the ambiguous use of words. When it is said by the Plaintiffs, that the dominant tenement, or rather one of the dominant tenements, is the *Beam Mine*, the expression *Beam Mine* is used to denote the lands which in time past were worked under that name. They are all situate in the parish of *St. Austell*, and have always belonged to the Plaintiffs, or to those under whom the Plaintiffs derive title. It is true, that in the lapse of years, probably of ages, it has been found that the tin ore worked in the parish of *St. Austell*, under the lands designated as the *Beam Mine*, extends, in the bowels of the earth, up to and across the boundary which separates the parish of *St. Austell* from the parish of *Roche*, and so into the soil and freehold of the Defendant *Pascoe*. But though the same name of the *Beam Mine* is applied as well to the lands and mine of the Defendant *Pascoe*, as to the lands and mine of the Plaintiffs, yet that is a mere matter of language. The lands and minerals of the Plaintiffs, in the parish of *St. Austell*, are as much a separate tenement from those of the Defendant *Pascoe*, in the parish of *Roche*, as if they had been designated by different names, and had been situate at a mile distance from each other. The owners of the minerals in *St. Austell* have no common interest with the owner of the minerals in *Roche*, though from their contiguity the mines may pass under one common name. The easement insisted on is a right to the stream of water for the use

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of the owners of certain mines and tinworks in the parish of *St. Austell*, called respectively the *Beam Mine*, the *Little Goodluck Tinwork*, and the *Pitmoor Tinwork*. It is no answer to such a claim that the owner of the land in the parish of *Roche*, through which the stream flows, is also the owner of mines in the same parish adjoining the mines in the parish of *St. Austell*, in respect of which the easement is claimed. This is certainly not a unity of possession.

It was further argued, that when the *Beam Mine* was worked by bounders, the Defendant *Pascoe* was one of the adventurers working under them, and this, it was said, created a unity of possession. He was at the same time the owner of the land bound to supply the water, and one of the persons for whose use it was to be supplied. But this argument is evidently untenable. If there were nothing else to be said against it, and if, instead of being one of twenty-nine adventurers, as the evidence shews him to have been, he had been the sole bounder or the sole adventurer working under the bounders, the mere fact that his title to the easement was not co-extensive with that of his title to the land charged with it, would be sufficient to prevent an extinguishment.

I have adverted to these questions of extinguishment as to the rights in artificial streams, because they were to some extent relied on in argument. The point, however, mainly relied on was that on which the judgment of the Vice-Chancellor proceeded, namely, that the easement insisted on was, if it existed, an easement belonging to the bounders, which, when the bounding came to an end, did not pass to the owners of the soil.

I have already given my reasons why I cannot agree with that judgment. My opinion is, that the Plaintiffs are entitled to the relief they pray for. They are entitled to their injunction, and further, to an inquiry what damage they have sustained by the obstruction since the month of September, 1864.

SIR J. L. KNIGHT BRUCE, L.J.:—

I respectfully differ also from the view of the Vice-Chancellor, and agree with that taken by the Lord Chancellor.

SIR G. J. TURNER, L.J. :—

I agree in opinion with the Lord Chancellor, and have only a few words to add. The Defendants, in the course of their argument, insisted that the bounders might well have acquired the right to the use of the water by custom. They did not indeed assert that there was any custom which would give the bounders that right, and certainly, as has been already observed by the Lord Chancellor, it does not appear that any such custom exists; but they argued that the bounders took such an estate by custom as would support a grant of the easement. I cannot, however, see how there could be a grant of the easement in perpetuity to bounders, amongst whom there is no hereditary succession. The Defendants also attempted to maintain their case upon the ground of the stream from which the water in question flows having originally been an artificial stream, and they relied much upon the case of *Gaved* v. *Martyn* (1). But there is abundant authority to shew that rights may well be acquired to the use of water in streams which may originally have been artificial, and the case of *Gaved* v. *Martyn* is plainly distinguishable from the present. The decision in that case, so far as it is in any way favourable to the Defendants' case, seems to have proceeded upon the ground that there had been no permanent abandonment by the miners of their right of control over the stream; but in this case there can be no doubt that all such right of control has long been abandoned.

Solicitor for the Plaintiffs: Mr. *Thomas Gill.*

Solicitors for the Defendants: Messrs. *Coode, Kingdon, & Cotton.*

(1) 34 L. J. (C. P.) 353.

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1866
March 7, 10, 13, 14, 17; *April* 21.

DAVIS *v.* SHEPHERD.

Agreement—Specific Performance—Quantity—Falsa Demonstratio—Boundary—Mines—Tenancy.

The owners of land agreed to demise to *A.* the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be eighty-three acres or thereabouts. The owners made a similar agreement with *B.* as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only:—

Held, on a bill filed by *B.* to restrain *A.* from working coal to the east of the fault, that the Court would not in a suit by *B.* for specific performance against the owners have decreed a demise of all the minerals to the east of the fault, and that he could not be deemed in constructive possession, so as to maintain his suit against *A.*

Quære, whether *B.* was tenant from year to year, or what his title was, and whether, under the circumstances, if the fault had run nearly in the direction of the line, a different construction would not have been given.

MISS *E. M. TURBERVILLE*, Sir *G. L. Glyn*, and *W. C. King*, were, in 1861, joint owners in fee of a farm and lands called *Blaenamman Fach* Farm, in the parish of *Aberdare*, in the county of *Glamorgan*. The Plaintiff *Davis* was at that time working coal to the east of the farm, the Defendant *Shepherd* to the west. Other persons were working coal to the south, and from their workings it was supposed that a certain fault or dislocation of the strata called a "downthrow fault to the west," or an "upthrow fault to the east," traversed the farm in a direction nearly north and south, cutting it into two nearly equal parts, as mentioned below.

On the 1st of September, 1861, an agreement was made and signed between the agent for the owners of the farm on the one part, and *Shepherd* and *D. Evans* (who afterwards died) of the other part; and thereby it was agreed "that the said Miss *Turberville*, Sir *G. L. Glyn*, and *W. R. King*, shall grant, and the Messrs. *Shepherd* and *Evans* shall take a lease of the coal, ironstone, and fireclay in and under a portion of the *Blaenamman Fach* Farm, situate in the parish of *Aberdare*, which lies to the *westward* of a downthrow fault to the west, *supposed to run through the said farm in*

the direction shewn upon the plan. The exact quantity cannot at present be ascertained, but it is supposed to be eighty-three acres or thereabouts." The agreement also provided that the lessees were to have power to take portions of the surface, not exceeding ten acres, for the purpose of sinking pits and shafts, constructing railways and engine-houses; that the term was to be fifty years from the 1st of November, 1861, at a certain rent of £185 a year, and royalties also to be paid on the coal raised, according to the seam from which it came; and that the lessee should leave a barrier where required in each vein; and contained several other provisions. A plan was annexed to the agreement, in which a straight blue line was drawn, representing the supposed direction of the fault.

On the 19th of July, 1862, the owners made an agreement with the Plaintiff *Davis* for a lease of the coal, ironstone, and fireclay to the *eastward* of the same fault, the quantity of land being therein described as supposed to be ninety-eight acres or thereabouts, and the fault being called "an upthrow fault to the east," which was admitted to mean the same as "a downthrow fault to the west." The term was to be forty years, at a fixed rent of £200 and royalties. A similar plan was annexed, and the agreement was *mutatis mutandis* nearly in the same terms as that with *Shepherd.* It was in evidence that *Davis* had notice at this time of *Shepherd's* agreement.

No leases were granted pursuant to these agreements, but both the lessees commenced working the mines which they had agreed to take, *Davis* from his former works on the east, and *Shepherd* from his former works on the west. *Shepherd* very soon encountered a fault not running near the line marked on the plan, but far to the west of it; so that, supposing it to continue, it would cut off to the west, not eighty-three acres, but only about eight acres. He, however, prosecuted his working through this fault, and proceeded to get the coal beyond it.

Davis thereupon filed his bill against *Shepherd* and the owners of the farm, alleging that this was the fault mentioned in the plan, and that *Davis* was entitled to a lease of all the coal to the east of this fault, and praying that *Shepherd* might be restrained from working coal to the east of this fault, and for an account.

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A great quantity of evidence was given on each side, the Plaintiff, amongst other things, adducing evidence to shew that a fault was the natural and proper boundary between two collieries, that to take another line and leave a fault within the bounds of a colliery would be contrary to the rules of good mining, and would render it necessary to leave a barrier of good coal between the two collieries, at a loss to one or both, and to the owners; also, that the owners refused to let the coal to the Plaintiff unless he took it up to this fault.

The Plaintiff moved for an injunction before Vice-Chancellor *Wood*, and the matter afterwards came on upon motion for decree, when the Vice-Chancellor decreed an injunction and an account, without prejudice to any proceeding which any of the parties to the suit might take, for enforcing the specific performance of the agreements for leases (1).

The Defendants appealed, and the appeal having been appointed to be heard before the full Court, they moved that they might be at liberty to bring forward new evidence, discovered by them since the hearing. The Plaintiff did not oppose this, and a great deal of further evidence was gone into on both sides, the Defendants

(1) May 4, 1865. Vice-Chancellor *Wood* said that he could not hold that there was any right in the Defendant. As regarded him, his limit was the fault, which undoubtedly existed. Though the acreage was called 83 acres or thereabouts, how could he say that, having a distinct boundary, he must go to the other side of it, or else he will not get his 83 acres. That might be a good ground for him to resist specific performance of his agreement against the owner; but his construction could not be enforced on others. His boundary was clearly to be a fault, though no one knew where it ran. The Plaintiff had his agreement, and was on the east of the fault; there was no opportunity given before the agreement was made of testing the course of the fault, and all that was said was that the lessors believed it to run in a certain direction, in which they were wrong. If you have once got your boundary, it makes no difference whether you call the land agreed to be let 83 acres or 1000 acres. The Plaintiff was in possession; the landlords did not threaten to turn him out, and did not even say at the bar that they would file a bill to have the agreement rescinded; and if they did not rescind it, they must complete it, and grant a lease of the coal up to the fault. Everything had reference to the fault. It might be doubtful whether, if the Plaintiff filed his bill for the purpose, he would get specific performance; but he was in possession, and could work on, unless his landlord brought ejectment. There was a legal interest in the Plaintiff, who, until he was disturbed, had an equitable interest also; that was strengthened by the landlords declining to rescind the agreement, and on the part of the Defendants there were no such interests.

attempting to shew that the fault in the adjoining colliery never reached the *Blaenamman Fach* Farm at all, and that the fault through which *Shepherd* had worked was not the fault mentioned in the agreement, but an independent fault.

The *Attorney-General* (Sir *R. Palmer*), Mr. *W. M. James*, Q.C., and Mr. *Freeling*, for the Plaintiff:—

It is clear that the Plaintiff has the legal interest in all the land up to the fault, the position of which was uncertain, and the Defendant took his chance of what his lease might comprehend; it was an aleatory contract, and each party took his chance. As to the acreage mentioned, *falsa demonstratio non nocet* (1): *Llewellyn* v. *Jersey* (2). The evidence is conclusive that a fault is the natural and proper boundary between two collieries, and that a landowner would never sanction any other. The Defendant is tenant from year to year: *Doe* v. *Bell* (3); *Doe* v. *Amey* (4).

Mr. *Rolt*, Q.C., Mr. *G. M. Giffard*, Q.C., and Mr. *Marten*, for the Defendant *Shepherd*:—

This is not a demise, but a license (5): *Doe* v. *Wood* (6); *Jones* v. *Reynolds* (7): and the right to take minerals cannot be the subject of a demise; the Plaintiff is therefore not in possession. The imaginary boundary was to be the real boundary, subject to any trifling deviation which might be found in the course of the fault, or unless a fault was found substantially in the same direction, but the agreements were never intended to give one man nearly the whole.

Mr. *E. Smith*, Q.C., and Mr. *T. H. Hall*, for the Landlords, as to the power of the Court to interfere in the case of trespass, cited *Flamang's Case* (8); *Haigh* v. *Jaggar* (9); *Vice* v. *Thomas* (10).

The *Attorney-General*, in reply:—

Whatever was the legal interest in the Plaintiff, it continues

(1) Shep. Touch. 99, 101.
(2) 11 M. & W. 183.
(3) 5 T. R. 471.
(4) 12 Ad. & E. 476.
(5) Shep. Touch. 96.
(6) 2 B. & A. 724; Coll. Mines, 11.
(7) 4 Ad. & E. 805.
(8) Cited in 7 Ves. 308.
(9) 2 Coll. 231.
(10) 4 Y. & C. Ex. 538.

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unaltered, and the landlord has done nothing to determine it. Moreover, it is clear from the cases that this is an agreement to demise, and not a license. This is a suit for an injunction, not for specific performance. There is nothing inequitable in enforcing this agreement; there has been no fraud; the Plaintiff has a legal right, and why should it be taken away and he be deprived of his remedy?

This may be a case where the Court would refuse specific performance of the agreement to lease, and leave the parties to law, but while we are tenants, we have a right to protection. Where a tenant from year to year applies to the Court for protection, what answer is it that the Court would refuse to assist him in getting a higher title? But there is no equity between these parties at all; if the Plaintiff is right the Defendant is wrong. There was neither fraud nor mistake; each party took his chance. The substance of the agreement was that each party should take the coal-field, bounded by its natural boundary, the fault, wherever that might be. The line on the plan is not to indicate the boundary, but merely that the fault was supposed to run in that direction—a simple statement of fact. The Defendants try to make out that the line is the boundary, which by the terms of the agreement it clearly was not. As to the theory that if there was a fault substantially in the direction of the line drawn, then that was to be the boundary, and if not, then the line, how can any one say what is substantially in the direction of the line?

April 21. LORD CRANWORTH, L.C., after stating the facts of the case and the pleadings, continued:—

The case as it came before us was partly an appeal and partly an original cause. It was very fully and ably argued, and numerous points were made both as to the law and to the facts. I have given the case my best attention, and the result is, that I am unable to concur in the view taken of it by the Vice-Chancellor. His Honour considered it clear that the Plaintiff was in possession of the mine from the eastern side of it up to the fault, and that the Defendant, having worked through that fault,

was a mere trespasser. I am unable to go with his Honour in this view of the case.

When the owner of real property, whether surface land or minerals, binds himself by a written agreement to grant a lease, and suffers his intended lessee, without a lease, to take possession, he must be understood to allow the lessee to take possession of all which he has engaged to demise. In the case of a demise of unworked minerals, there can hardly be said to be actual possession of any part of them except of what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession, and the lessee does take possession and commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise. I cannot, however, think that the lessee can be treated by this Court as constructively in possession of anything of which the lessor did not intend to put him in possession, and of which this Court shall say the lessor is not bound to grant a lease. The result of granting an injunction in such a case might be that, when in subsequent litigation in this Court the question should arise directly as to the extent of the property to be demised, it would turn out that the Court had improperly restrained the owner from dealing as he thought fit with his own land or mines.

Proceeding then on this principle, the question to be answered is this: has the Plaintiff shewn that the Defendants, the lessors, are bound to grant him a lease of the mines under *Blaenamman Fach* Farm, beginning from the eastern boundary up to the fault, through which the Defendant *Shepherd* has been working? I think he has not. For assuming the Plaintiff to be right in saying that the upthrow fault to the east, through which the Defendants have been working, is the same fault which diverges so much to the west before it reaches *Blaenamman* as to leave to the west of it not eighty-three acres, as marked on the plan, but only eight acres—assuming, I say, this to be so, I think this Court would refuse to compel the intended lessor to grant a lease which should embrace an area of mine so very largely in excess of that which, as is obvious from the agreement and the plan, both parties contemplated.

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It was said in argument that both the contracting parties knew there was uncertainty as to the extent of what was to be demised. No doubt that is true. But the amount of that uncertainty is indicated, so far as such a matter can be indicated, by the language used. The fault is said to be "supposed to run in the direction shewn by the line on the plan." The exact quantity cut off to the east of the line is said to be "supposed to be ninety-eight acres or thereabouts." It is impossible in such a case to define with accuracy what latitude can be allowed as to the quantity to be demised—how much in enforcing the agreement the Court would compel the lessor to allow beyond ninety-eight acres if the line of the fault should be proved to run to the west of the line shewn on the plan. It is impossible, on such a subject, to lay down any general abstract rule, and if the deviation had been such as to include 108 acres, or even 118 acres, instead of 98 acres to the east of the line, it would have been open to fair argument that the excess might be covered by the vague words "or thereabouts."

But I do not feel myself driven to solve any such questions in the present case. It is certain that neither party contemplated such an addition to the ninety-eight acres as the Plaintiff is now contending for. The lessor had already agreed to demise to the Defendant *Shepherd* all the mine to the west of the fault described as supposed to be eighty-three acres or thereabouts. This was known to the Plaintiff. And when the Plaintiff entered into this agreement, it could not have been in the contemplation of either party that under such loose and vague words as "or thereabouts" it could have been intended to oblige the Defendant to accept eight acres instead of eighty-three acres; and I see no reason why the same principles which would guide the Court in construing words of this sort in an agreement for sale or demise of the surface, should not be acted on when we are dealing with minerals, though, no doubt, there is in such subjects more difficulty in fixing a boundary.

On this short ground, I am of opinion that the Plaintiff cannot, in this Court, be considered as being constructively in possession of any minerals not coming within the description of ninety-eight acres or thereabouts, and not separated from the western border

of *Blaenamman Fach* by a line running in the direction, or nearly in the direction, of the line marked on the plan.

I have considered the case hitherto, adopting the hypothesis of the Plaintiff, that the fault through which the Defendant *Shepherd* has pushed his workings is the fault intended to be shewn on the plan. But I desire it to be understood that I am by no means satisfied that this is the case. It is extremely difficult to appreciate accurately the evidence of the persons who describe the nature and direction of the faults as traced in the adjoining mine. But I concur with both my learned brothers in the opinion that there seem to be very strong grounds for thinking that the fault marked on the plan may not be that through which the Defendant *Shepherd* has penetrated. In order to establish his title, the Plaintiff was bound to make this part of his case out, so as to leave no reasonable doubt on the subject—and he has failed to satisfy me on this point.

But I do not go into this question in detail, because, for the reasons I have stated, I think that, even if all this were made out in proof, this Court cannot treat the Plaintiff as being constructively in possession of the mine now in dispute. My opinion therefore is, that the decree we ought to make is simply to dismiss the bill, with costs.

SIR G. J. TURNER, L.J.:—

I fully concur in the Lord Chancellor's judgment, and in the reasons on which it is founded, and I should not have thought it right to occupy the time of the Court in stating the reasons which have led me to the same conclusion, had I not fully considered the case and formed my opinion upon it before I was aware of the conclusion at which the Lord Chancellor had arrived.

The first question which presents itself is, what, according to the true construction of the agreement of the 19th of July, 1862, is the boundary of the mine agreed to be demised to the Plaintiff? It is contended for the Plaintiff that this boundary is the fault in question, through whatever part of the farm that fault may run. It is not necessary to consider what would have been the proper construction of this agreement if it had stopped at the words "upthrow fault to the east"—for these words are followed by a

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description of the fault as "supposed to run in the direction shewn upon the plan annexed to the agreement," and by a statement that the quantity cannot at present be ascertained, but is supposed to be ninety-eight acres or thereabouts, and the plan annexed to the agreement lays down the direction of the fault as leaving about ninety-eight acres to the east of the supposed fault. It is argued for the Plaintiffs that the parts of the agreement to which I have last referred amount to no more than *falsa demonstratio* of the words "upthrow fault to the east," but I do not agree in that view. I think that the description of the property intended to be demised cannot be taken merely from the words "which lies to the eastward of the upthrow fault to the east," but that the following words, at least so far as they refer to the supposed direction of the fault and as they refer to the plan, and likewise the plan itself, must also be considered as descriptive of the property intended to be demised, and that from the whole description of the property, taken together, it sufficiently appears that what was really intended by this agreement was an agreement to demise the ninety-eight acres or thereabouts bounded by the fault, if fault there was, in the direction marked on the plan; the reference to the supposed direction of the fault being inserted like the common words "more or less" in the description of parcels in a deed, to allow of any trifling diminution or increase which might be occasioned by the fault not running in the precise direction laid down upon the plan.

It was further argued for the Plaintiff, that it was intended both by the lessor and lessee that each of them should take the chance of the quantity of the mine to be included in the demise, and that this was a mere matter of speculation on both sides; but this appears to me inconsistent with the whole tenor of the agreement. Could it have been intended that the lessee should pay a dead rent of £200 a year, when he might take a mere fraction of the mines from the fault happening to run nearer to those mines which he was already in the occupation of. And again, how is this supposed case of speculation to be reconciled with the mention of ninety-eight acres or thereabouts in the agreement and in the plan?

The view which I have thus taken of the construction of this

agreement is, I think, much strengthened by reference to the correlative agreement of the 14th of September, 1861, which indeed more pointedly illustrates the observations I have made; inasmuch as, if the Plaintiff's contention be well founded, and be applied to that agreement, *Shepherd* would have to pay a dead rent of £175 for eight acres of mine, and could not even have the ten acres of surface provided by that agreement.

I think, therefore, that the Plaintiff's case, even upon his own agreement, cannot be maintained; but supposing this point to be open to more doubt than it seems to me to be, there are other points which, in my judgment, are scarcely, if at all, less fatal to the Plaintiff's case. The Plaintiff coming into equity must, as it seems to me, found his title to relief upon one or other of these grounds—either upon his right under his agreement, or upon the footing of his being entitled to call for the assistance of this Court in aid of a legal right. If we look at this case with reference to the Plaintiff's right under his agreement, then I think it reasonably clear, for the reasons which the Lord Chancellor has stated, that specific performance of the agreement would not be decreed. I do not, however, go the length of saying that this is a case in which this Court would set the agreement aside and order it to be cancelled, as founded in mistake; although I am by no means prepared to say that the Court would not do so, as the agreement seems to me to have proceeded on both sides upon the footing that the fault was supposed to run in the direction laid down upon the plan, and it has subsequently appeared that it does not in fact run in that direction.

If, then, the Court would not have decreed specific performance of this agreement, ought the Court to interfere at the instance of a Plaintiff claiming under a title giving him no right in equity against a third person claiming with or without right under a title similarly derived and antecedently created? I think it ought not so to interfere; for its interference must be based upon some equitable right giving title to such interference.

It was said on the part of the Plaintiff that the question whether he was or was not entitled to have his agreement performed, was a question between him and his intended lessors, and that the Defendant *Shepherd* has no right to set up the *jus tertii*. But a

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Defendant in equity has surely a right to shew that the Plaintiff has no equitable title, and the evidence in this cause satisfies me that, so far as the Plaintiff's case rests upon specific performance, he has no such title. The fact which appears upon the evidence that the Plaintiff, when he entered into his agreement, had notice of the agreement under which the Defendant *Shepherd* holds, tends I think very much to strengthen this part of the case against the Plaintiff.

Then as to the Plaintiff's right to call for the assistance of this Court in aid of his alleged legal right, the case rests upon this: that possession having been given to him under his agreement, he became tenant from year to year upon the terms of that agreement. But assuming that there would be a tenancy from year to year in a case of this nature, on which I give no opinion, this argument, at all events, involves an inquiry of what mines possession ought to be considered to have been given to the Plaintiff under his agreement. This case of interference upon the footing of a legal title therefore works round again, as it seems to me, to the question what was intended to be demised, as to which I have already expressed my opinion.

I may add that, looking to the evidence adduced since the hearing before the Vice-Chancellor, the Plaintiff, on whom the *onus probandi* plainly rests, has certainly not satisfied me that the fault is not in fact a distinct and separate fault; and I may further add that the effect of this decree, proceeding as it does upon the assumed legal title, seems to me to give the Plaintiff indirectly the full benefit of his agreement according to his construction of it, although this Court, if directly applied to for performance of that agreement, would not in my opinion have been justified in enforcing it.

Upon these grounds I find myself unable to agree in the opinion of the Vice-Chancellor, and I think that this bill ought to have been dismissed, and dismissed with costs.

SIR J. L. KNIGHT BRUCE, L.J.:—

Independently of any view which I may take, the concurrent opinion of the Lord Chancellor and Lord Justice is sufficient,

and the bill stands dismissed. But I am bound to say that the Plaintiff has not, in my opinion, established a sufficiently clear case to justify this Court in interfering. The case is too obscure and difficult for an injunction, and the only course is to dismiss the bill.

Bill dismissed with costs. No costs of the appeal.

Solicitor for the Plaintiff: Mr. *T. Clark.*

Solicitors for the Defendant *Shepherd:* Messrs. *Cunliffe & Beaumont.*

Solicitors for the Lessors: Messrs. *Price, Bolton, & Filder.*

In re ROWLAND & CRANKSHAW.

L. C.
1866
April 16.

Bankruptcy—Joint Estate—Partnership—Practice—Exceptions.

C. entered into an agreement with *R.* that *R.* should buy and sell goods on behalf of *C.*, and that the business should be carried on as *R. & Co.*, *R.* being paid by a salary and a percentage on profits. The business was managed by *R.*, but *C.* had bought goods for it. Each became bankrupt:—

Held, that the book debts and stock in trade of *R. & Co.* were joint estate of the two.

On an appeal coming on for further consideration, after the Commissioner has made a certificate in pursuance of a reference, the finding may be disputed without having been excepted to.

ON March 1, 1864, an agreement was made between *William Crankshaw* and *William Rowland*, calling themselves crinoline manufacturers, to the following effect: that *Crankshaw* would employ *Rowland* as his traveller and superintendent for fifteen months; that *Rowland* should purchase goods for *Crankshaw* without commission; that *Rowland* should receive a salary of £150 a year, and 10 per cent. on the net profits remaining after the £150 had been deducted therefrom; that the business should be carried on under the firm of *Rowland & Co.*; and that on the 1st of July, 1865, a partnership should be formed between them on certain terms therein mentioned. Under this agreement a business was

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carried on for some time. On March 27, 1865, *Rowland* was adjudged bankrupt, and on March 28, *Crankshaw* was adjudged bankrupt, on a separate Petition. On April 10, an order was made vesting the estate of *Crankshaw* in the Official Assignee of *Rowland's* estate, all separate proceedings under *Crankshaw's* bankruptcy were stayed, and his bankruptcy was annexed to *Rowland's*.

The order under appeal was made in the *Manchester* Court of Bankruptcy, and dated December 21, 1865, and thereby it was found (amongst other things), that there was joint estate of the two bankrupts, consisting of property acquired by them in the business carried on by them as *Rowland & Co.*, and that such estate was, and had been, kept separate and distinct from the separate dealings and transactions of *Crankshaw*, and from his separate estate, and it was ordered that Messrs. *Shaw & Co.*, who claimed about £1000, and who had dealt with *Crankshaw* separately, should be admitted to prove against his separate estate.

Messrs. *Shaw & Co.* appealed against this order, and the grounds taken by them at the bar, on the appeal, were, that there was in fact no partnership, and that under the agreement all the estate belonged to *Crankshaw*, and was his separate estate.

The Lord Chancellor on January 27, 1866, when the appeal was first heard, made a reference to the Commissioner as to the estates. The bankrupts were thereupon again examined, and other evidence taken before the Commissioner, who certified that there was joint estate of the bankrupts in their partnership or alleged partnership, and that the same consisted of stock in trade, machinery, fixtures, and book debts, which were of the estimated value of £3516, and that there was separate estate of *Rowland* of the value of £29, and separate estate of *Crankshaw* of the value of £168.

It appeared, from the examination of some of the creditors, that *Rowland* managed the business and made nearly all the purchases, but that some purchases had been made by *Crankshaw*, and several creditors deposed to their having given credit to the bankrupts as partners. The whole of the capital was furnished by *Crankshaw*.

The appeal now came on again for argument upon the return of the Commissioner.

Mr. *De Gex*, Q.C., and Mr. *Swanston*, for the appellants, Messrs. *Shaw & Co.*, objected to the certificate of the Commissioner, and argued that it was not justified by the facts.

Mr. *W. M. James*, Q.C., and Mr. *E. R. Turner*, for the assignees, objected that as no exceptions had been taken, the finding of the Commissioner must be conclusive.

The LORD CHANCELLOR, however, held that formal exceptions to a certificate were not required in bankruptcy, and that upon the Petition coming on for further consideration it was open to either side to argue that the return was not correct in law or in fact.

Mr. *De Gex*, and Mr. *Swanston*, then proceeded to contend that the £3,516 ought to be held separate estate of *Crankshaw*. He had furnished all the capital, all the property belonged to him, and *Rowland* was only his servant at a salary until July, 1865, when he was to become a partner. If there had been no bankruptcy *Rowland* could have claimed no part of the property, and his assignees could take nothing except through him. No doubt they had held themselves out as partners, and both would be liable on an action at law, but that had nothing to do with the inference which the Commissioner had drawn, that it was joint property. The evidence if anything, was an attempt to show that this was a case of reputed ownership, but even if that had been made out, in the present state of the law, property not belonging to a bankrupt and merely in his reputed ownership did not vest in the assignee, under section 125 of the Act of 1849, without a special order: *Heslop* v. *Baker* (1); *Quartermaine* v. *Bittleston* (2). The assignee could only claim the property either as being in the reputed ownership of the two, which it was not on account of the previous bankruptcy of *Rowland*, or else as joint estate, which it clearly was not under the agreement.

Mr. *W. M. James*, and Mr. *E. R. Turner*:—

We do not say that the case is within the 125th section, but

(1) 6 Ex. 740. (2) 13 C. B. 133.

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that the two bankrupts held out and represented themselves to the world as partners, and acquired this property as joint property, and that neither they, nor their separate creditors who claim under them, can be heard to allege the contrary: *Bond* v. *Pittard* (1); *Ex parte Chuck* (2).

Mr. *De Gex*, in reply.

Lord Cranworth, L.C.:—

The question of reputed ownership has nothing to do with this case. When two partners are bankrupts, all the property must go in payment of all the creditors. In the administration of bankruptcy it has been the object from the earliest times to apportion the assets as fairly as possible between the joint and the separate creditors. There is often much difficulty in doing this satisfactorily, but some rules have been clearly laid down, for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now what is said here is, that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the name of *Rowland & Co.*, and tradesmen supplied them with large quantities of goods, and then they became bankrupts, and it is now said that they were not partners, and that the real agreement between them was, that everything belonged to *Crankshaw*. That is no reason, and as *Crankshaw* suffered *Rowland* to trade in the name of the firm, any persons trading with him are entitled to say that *Rowland & Crankshaw* are the persons with whom they dealt, and that the goods are joint goods. This motion must be refused, and with costs.

Solicitors for the Appellants: Messrs. *Pritchard & Englefield.*
Solicitors for the Assignees: Messrs. *Johnson & Wetheralls.*

(1) 3 M. & W. 357. (2) 8 Bing. 469.

HILL v. CURTIS.

Practice—Vacating Enrolment.

L. C.
1866
May 24.

Where one party had enrolled a decree as quickly as the practice of the Court would allow, his knowledge that the other party intended to appeal:—*Held*, not a ground for vacating the enrolment.

THIS was a motion by the Plaintiff to vacate the enrolment of a decree made on the 24th of November, 1865, dismissing the bill with costs. The facts on which the Plaintiff relied were, that on the 27th of November, Mr. *Hocombe*, the Plaintiff's solicitor, informed Mr. *Fortune*, the *London* agent of the Defendant's solicitor, that he had received instructions to appeal, and asked *Fortune* whether he thought that an appeal in the suit, if at once set down before the Lord Chancellor, would be heard before Christmas; to which *Fortune* replied that he was not aware of the state of the Lord Chancellor's paper of causes, but he thought it might be possible. On the same day, *Fortune* attended at the hearing of a summons in a suit of *Dennison* v. *Curtis*, for an enlargement of the time for filing evidence in that suit until after the appeal in *Hill* v. *Curtis* should have been heard, and informed the Chief Clerk that there was no such appeal in existence; and when the Chief Clerk said that in that case he must dismiss the summons, *Fortune* replied it was not necessary to do that, for he would consent to enlargement of time until the 20th of December. On the 29th of November *Fortune*, and *Binsteed* the Defendant's country solicitor, called at *Hocombe's* office, and *Hocombe* said: "I suppose, Mr. *Binsteed*, you have heard that we intend to appeal in *Hill* v. *Curtis*?" to which *Binsteed* replied: "Yes; so *Fortune* has been telling me."

The decree in *Hill* v. *Curtis* was settled on the 5th of December, passed on the 7th of December, and left for entry on the same day. On the 9th of December *Fortune* obtained the decree from the entering seat, and left it, and also the docket of enrolment, with the Record and Writ Clerk for examination and enrolment, and the decree was accordingly enrolled.

Mr. *G. M. Giffard*, Q.C., and Mr. *Horsey*, in support of the motion

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to vacate the enrolment, argued that one clear day was always allowed to elapse after a decree was passed before it was given out to the parties. Where a party having knowledge of a *bonâ fide* intention to appeal enrols the decree with undue haste, the enrolment will be vacated: *Hill* v. *South Staffordshire Railway Company* (1).

Mr. *Willcock*, Q.C., and Mr. *Casson*, for one of the Defendants:—

The Plaintiff should have entered a caveat if he wished for time to appeal. To vacate the enrolment of a decree, surprise or *mala fides* must be shewn: *Wildman* v. *Lade* (2). In *Williams* v. *Page* (3) there was irregularity. *Pearce* v. *Lindsay* (4) was decided on the ground of surprise; and *Stevens* v. *Guppy* (5) because the solicitor had been misled. In *Hill* v. *South Staffordshire Railway Company* there had been an assent to the appeal.

Mr. *C. Hall*, for another Defendant.

Mr. *Giffard*, in reply.

LORD CRANWORTH, L. C.:—

The Defendant's solicitor is here stated to have proceeded with undue haste. I do not know what that means. The Court lays down certain rules of procedure, regulating, among other things, the times within which certain acts are to be done; and if parties keep within those rules, I cannot call their so doing undue delay or undue haste. The grounds on which the Court will usually vacate the enrolment of a decree are, if there has not been *mala fides*, the existence of something said or done by the party enrolling which may have been understood as meaning that he did not intend to object to the appeal. Now, I do not find anything here which amounts to that, for what took place on the three occasions which were relied on in support of the application seems to me to come far short of any such meaning. The first of these occasions is the meeting on

(1) 2 D. J. & S. 230; 10 Jur. (N. S.) 531.
(2) 4 De G. & J. 401.
(3) 1 De G. & J. 561.
(4) 4 De G. & J. 211; 5 Jur. (N. S.) 661.
(5) T. & R. 178.

the 27th of November, when the discussion took place as to the probability of the appeal being heard before Christmas; but the reply of the Defendant's solicitor merely amounted to saying: "If you appeal I believe it is possible the appeal may be heard before Christmas," and was entirely contingent. The second occasion was two days afterwards, when Mr. *Hocombe*, in Mr. *Fortune's* presence, said to Mr. *Binsteed*: "I suppose you know we are going to appeal." That was a distinct notice of an intention to appeal, but it goes no further. The third occasion was on the summons for an enlargement of time in *Dennison* v. *Curtis* until the appeal in this suit was heard, when, in reply to the objection of the Chief Clerk to enlarge the time, when no appeal was actually in existence, Mr. *Fortune* said he would consent to an enlargement of time in *Dennison* v. *Curtis*. I cannot say that I think all this can be interpreted to amount to acquiescence on the part of the Defendant's solicitor.

Whether in all the reported cases the facts have been sufficient to bear out the conclusion at which the Court has arrived, I am not prepared to say. I am not sure that I should have come to the same conclusion to which the Lords Justices are reported to have come in the case of *Hill* v. *South Staffordshire Railway Company* (1), and whether it was a fair interpretation of the acts of the solicitor to consider them as amounting to surprise, I do not know; but if their Lordships considered that mere knowledge of an intention to appeal is sufficient ground to vacate the enrolment of a decree, then I should, with all deference, say that I am unable to agree with them.

This motion will be refused with costs.

Solicitors for the Plaintiff: Messrs. *Elcum & Hocombe.*
Solicitor for the Defendant: Mr. *Fortune.*

(1) 2 D. J. & S. 230; 10 Jur. (N. S.) 531.

L. C.
1866
June 6.

In re UNIVERSAL BANK.

Practice—Winding-up—Appeal—Companies Act, 1862, *s.* 124.

The restriction of appeals in section 124 of the *Companies Act*, 1862, to those in which notice had been given within three weeks after the making of the order appealed from, does not apply to appeals from any order made on the original Petition for winding-up.

IN this case a Petition for winding-up a company called the *Universal Bank, Limited*, had been dismissed by the Master of the Rolls, and the Petitioner presented a Petition of appeal. The Lord Chancellor's Secretary refused to receive the Petition of appeal because the 124th section of the *Companies Act*, 1862, in giving the Court jurisdiction to hear re-hearings and appeals, provides that no such re-hearing or appeal shall be heard unless notice of the same is given within three weeks after the order complained of has been made; and in this case the three weeks had already expired, and therefore the order to set down the appeal, which was the ordinary notice, could not be given within the time limited by the Act.

Mr. *Darby*, for the Petitioner, now applied that the Petition of appeal might be received and answered; contending that the appeal contemplated in section 124 was an appeal from a proceeding under the winding-up, and not from any order made on the original Petition for winding-up. *In re Anglo-Californian Gold Mining Company* (1) was an analogous case.

The LORD CHANCELLOR said that he thought the principle was the same, and that the 124th section applied to orders made under an existing order to wind-up, and not to orders on the original Petition. His Lordship would direct his Secretary to receive the Petition of appeal.

Solicitor: Mr. *W. A. Day.*

(1) 1 Dr. & Sm. 628.

In re MARKS' TRUST DEED.

L. JJ.
1866
June 9.

Composition Deed—Bankruptcy Act, 1861, s. 197—*Production of Mortgage Deed.*

The 197th section of the *Bankruptcy Act*, 1861, giving the Court power under a registered deed to make the same orders as if the debtor were bankrupt, is not confined to deeds assigning property of the debtor.

A creditor of a debtor who had executed a registered deed, not passing any property, but containing a covenant to pay the debts by instalments, summoned another creditor to be examined, and called upon him to produce a mortgage deed which he held on part of the debtor's property:—

Held, that production ought to be ordered.

THIS was an appeal from a decision of Mr. Commissioner *Holroyd*, that the Appellant was bound to produce a mortgage deed.

By a deed, dated the 5th of January, 1865, and expressed to be made between *David Marks* of the one part, and the several persons whose names and seals were thereto subscribed and affixed, and all other persons whether assenting to the deed or not, being creditors of *Marks*, of the other part, *Marks* covenanted with the creditors to give each of them eight promissory notes, each note being for 2*s.* 6*d.* in the pound on the creditor's debt, such notes to be payable at intervals of six months; and the assenting creditors covenanted with *Marks* to receive the notes in full satisfaction of their respective debts, and not to take any proceedings against him until default should be made in payment of some of the notes.

This deed was registered under the *Bankruptcy Act*, 1861, s. 192.

In 1859 *Marks*, who was a printseller, had borrowed from a Mr. *Hendriks* £2,500, and for securing the repayment had given him a bond, and also deposited with him a large quantity of engraved copperplates, with a written memorandum of deposit. Some of the plates were from time to time lent by *Hendriks* to *Marks* that he might take impressions from them, and ultimately *Marks* got the whole into his hands. At the time when the composition deed was executed a considerable sum remained due to the executors of

L. JJ. 1866. *In re* MARKS' TRUST DEED.

Hendriks, who had died in the meantime, and none of the plates were in their possession.

The executors of *Hendriks*, in May and October, 1865, had *Marks* summoned and examined. He stated that he had pledged the plates to Messrs. *Dickenson & Co.* by way of security. The executors then obtained a summons against them.

On the 2nd of May, 1866, Mr. *Barlow*, a member of the firm of *Dickenson & Co.*, attended in pursuance of the summons, and wa examined. He admitted that *Marks* had deposited with them more than fifty plates. He said that he had not had the plates valued, and had no notion of what was their value, and had no belief as to whether they were of greater value than £5,000. He was then asked how much money he and his firm had advanced to *Marks* on the security of the plates in their possession. This question he refused to answer. He further stated that the firm held a mortgage deed and some deposit agreements relating to the plates, but refused to produce any of them.

The Registrar before whom the examination took place held that the witness was bound to answer the question and produce the documents. The case was then brought before the Commissioner, and the examination continued before him, when Mr. *Barlow* persisting in his refusal, the matter was brought before the Lords Justices.

Mr. *Bacon*, Q.C., Mr. *Robertson Griffiths*, and Mr. *North*, for *Barlow*:—

Even if assignees in bankruptcy could have compelled production of this deed, it does not follow that the creditor in the present case can. The 197th section cannot be construed as giving every creditor all the rights which assignees in bankruptcy would have had. The powers which this section gives are to be very cautiously exercised: *Ex parte Alexander* (1). Assignees in bankruptcy in whom all the property of the bankrupt is vested stand in a very different position from creditors under a deed like this, which gives them no specific lien on the debtor's property, so that they cannot have any right to an inquiry as to it. *Ex parte Caldecott* (2), is relied on against us, but an exception to the

(1) 1 D. J. & S. 311. (2) Mont. 55.

general rule that a mortgagee is not bound to show his deeds until he is paid off is not to be extended, and the 197th section does not apply where there is no property to be administered.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for *Hendriks'* executors:—

We, as creditors, are entitled to full information as to the debtor's affairs, in order to see whether the deed is assented to by the requisite number of creditors, whether it is a reasonable deed, and whether there is any secret arrangement which would prevent its being binding. The 197th section applies to all creditors, whether they have assented to the deed or not: *Ex parte Brooks* (1). The 189th section gives extensive powers of summoning and examining. In bankruptcy a creditor can summon anybody to be examined: *Cooper* v. *Harding* (2); and the 197th section introduces the same power under a composition deed: *Ex parte Alexander* (3); *Hemming* v. *Pugh* (4). The information which this inquiry may elicit may be material for ascertaining whether the deed is valid. If the state of the assets is such that the debtor could readily pay 20*s.* in the pound at once, a deed like this could not bind non-assenting creditors. *Ex parte Caldecott* is directly in our favour, and has always been followed.

Mr. *North*, in reply:—

The examination is carried on for a purpose wholly alien to the objects of bankruptcy, being merely for the purpose of enabling *Hendricks'* executors to set up their security against ours.

SIR J. L. KNIGHT BRUCE, L.J.:—

In a matter connected with bankruptcy, in which the learned Commissioner undoubtedly had jurisdiction, he had before him a person examining and persons examined on matters connected with the estate to be administered. In the course of the questions put before the Commissioner, one question was put which related to the production and inspection of a deed in the possession of one of the parties under examination. The possession of the deed was admitted. It was alleged by one of the persons examined that

(1) 33 L. J. (Bky.) 41.
(2) 7 Q. B. 928.
(3) 1 D. J. & S. 311.
(4) 1 N. R. 239.

L JJ. 1866 *In re* MARKS' TRUST DEED.

the deed bore on the subject in dispute, and if produced would throw light on it. This was hardly denied, but it was urged that it related merely to a debt due to one of the persons under examination, and therefore ought not to be produced. I cannot agree with this on the ground of principle, practice, or precedent. One of the persons before the learned Commissioner had in his possession an instrument relating to property of his own, but containing material information as to the rights of other parties, and I think the Commissioner was quite right in holding that it ought to be produced.

SIR G. J. TURNER, L.J.:—

On the opening of this case I felt great difficulty, for I could not at first sight see how, under a mere composition deed containing only a covenant to pay the debts by instalments and passing no property, it could be material to a creditor to have an inquiry made into the property of the debtor. What the creditors take under such a deed is merely the covenant of the debtor, and in ordinary cases persons taking such a covenant would have no right to an account of the debtor's assets. I perhaps felt the more difficulty in the case on the ground of the objection which Courts of Equity have always had to compelling a mortgagee to produce his deeds. But the argument has satisfied me that it might be material to the creditors to have production of the mortgage deed, for its production might end in showing the security to be invalid, and this, by altering the amount of the assets, might bear on the question whether the composition deed was a reasonable one. The real question, however, is, whether the statute has given the creditor a right to call for the production of the mortgage deed. Now, I think that under the 197th section the rights of a creditor under a deed such as the present are the same in this respect as they would be in bankruptcy. No doubt the greater part of that section refers to deeds by which an assignment of property is made, but the introductory part of it refers to all such deeds as are mentioned in section 192, and the concluding sentence, "except where the deed shall expressly provide otherwise the Court shall determine all questions arising under the deed according to the law and practice in bank-

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ruptcy so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt and his estate were administered in bankruptcy," contains nothing to restrict it to deeds containing an assignment of property. I therefore cannot see how to avoid the conclusion that the Court has power to order production of this mortgage deed, unless it be held that it would not have that power in bankruptcy. But I think that according to the case of *Ex parte Caldecott* (1), production of the deed would have been enforced in bankruptcy. I am of opinion, therefore, that the learned Commissioner's view was right, though I come to the conclusion with some reluctance, as I am unwilling to compel mortgagees to produce their title deeds.

Solicitors for the Appellant: Messrs. *Hawkins, Bloxam, Paterson, & Power.*

Solicitors for the Respondents: Messrs. *Walter & Moojen.*

In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

L. JJ.
1866
June 25, 30.

EMMERSON'S CASE.

Winding-up—Transfer—Contract—Companies Act, 1862, *s.* 153.

Under the *Companies Act*, 1862, the Court has a discretion to make valid any dealings with shares between the presentation of a Petition for winding-up and the order made upon it, but

Held, reversing the order of the Master of the Rolls, that an agreement for the sale of shares in a company, entered into in ignorance that a Petition for winding-up the company had been presented, was not enforceable or valid, so as to make the purchaser a contributory.

MR. *EMMERSON*, the appellant, had in two cases bought shares in the *London, Hamburg, and Continental Exchange Bank (Limited)*, after a Petition for winding-up that company had been presented, both he and his vendors, Mr. *Ward* and Colonel *Tombs*, being in ignorance of that fact. The Master of the Rolls had

(1) Mont. 55.

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EMMERSON'S CASE.

placed Mr. *Emmerson* on the list of contributories in respect of these shares. The facts and arguments are fully reported (1).

Mr. *Emmerson* now appealed.

Mr. *Baggallay*, Q.C., and Mr. *E. K. Karslake*, for Mr. *Emmerson*:—

On the ordinary principles of law and equity, a contract to sell shares, entered into in ignorance that the company was defunct, could not be enforced, and the *Companies Act*, 1862, makes no difference. The Act says that some transfers shall be void, but does not make any contract good which would be bad otherwise.

Mr. *Everitt*, for Colonel *Tombs*, one of the vendors, said that *Emmerson* bought as a speculator, and took his chance as to what might be the position of the company, and referred to section 84 and section 114 of the Act, which were controlled by section 153. The company was not dissolved until the final order.

Mr. *E. R. Turner*, for Mr. *Ward*, the other vendor, said that the Court had, under section 153, the option to allow the transfer or not. These are not like dealings in houses or lands, but like dealings in a mine, which may be exhausted or filled with water at the time, and yet the sale would be good: *Norway* v. *Rowe* (2); *Cheale* v. *Kenward* (3).

Mr. *Selwyn*, Q.C., and Mr. *Roxburgh*, for the official liquidator, made no objection to the transfer.

Mr. *Baggallay*, in reply.

June 30. SIR G. J. TURNER, L. J.:—

In these cases a registered owner of shares in the company sold the shares after a Petition to wind up the company had been presented, but before it had been advertised, and, of course, before any order to wind up the company had been made.

The sales were in all respects *bonâ fide* sales. Neither the vendor nor the purchaser had notice that the Petition to wind up

(1) Law Rep. 2 Eq. 231. (2) 19 Ves. 159. (3) 3 De G. & J. 27.

3 Beav. 576. 1 Ph. 494

had been presented, and the purchase moneys were paid and the transfers were executed by the vendors and delivered to the purchaser, but the purchaser had not been put upon the register when the order to wind up the company was made. In settling the list of contributories under the order to wind up, the Master of the Rolls has put the purchaser of the shares upon the list in the place of the registered owners, and the purchaser has appealed from these orders.

Several points were raised and argued upon the appeal: first, that the 153rd section of the *Companies Act* of 1862, on which the Master of the Rolls proceeded, applies only between the company and the shareholders, and that it was for the protection of the company only, and does not apply to cases like the present: and, secondly, that assuming that section to apply between individual shareholders, the discretion given by it has been improperly exercised by the Master of the Rolls.

Upon the first of the points it is not, in my judgment, after having given the case much consideration, necessary for me to give any opinion; but as the point is one of much importance, it may be right for me to say that I see no reason to think that the Master of the Rolls had not full authority to deal with these cases under this section. This section plainly refers to the 84th section, and in terms refers to transfers of shares and to alterations in the status of members of the company; and having regard to the fact that the rights between the company and the shareholders must, to some extent at least, involve the rights between the shareholders and other persons, I do not see how it can well be said that the discretion given by the section was not intended to be given with reference to these latter rights. Such a construction of the section would obviously be most inconvenient, and might lead to great injustice, as it would make the section operate so as necessarily to invalidate all transactions between shareholders and other persons, although they may have been perfectly fair and *bonâ fide*. The 163rd section was relied upon in support of the construction contended for. To say nothing as to the words "void to all intents" which occur in this section, and which are not unimportant, as a distinction has, I think, been taken upon these words in Acts referring to other matters, it is sufficient to say that this

L. JJ. 1866 EMMERSON'S CASE.

section gives no such discretionary power as is given by the 153rd section. I think, therefore, that the Master of the Rolls has rightly held that the discretion given by the 153rd section extends to such cases as the present.

I think also that he has rightly held that the question of notice was to be looked at in the exercise of this discretion. The 131st section goes far, I think, to shew that in the case there dealt with no discretion is given, because a voluntary winding-up proceeds upon resolutions of the shareholders, of which every shareholder would have notice.

Having gone thus far, however, with the Master of the Rolls, I can go no further. I think that the discretion given by the 153rd section only authorizes the Court to say that a transfer of shares, or an alteration of the status of a member of the company, may be valid, notwithstanding it took place between the commencement of the winding-up and the order to wind up. It does not in other respects alter the effect of the transfer or alteration of status, and here there occurs a difficulty in these cases which I find myself quite unable to surmount. These shares were not transferred into the names of the purchaser. The transactions were in this respect incomplete, and, under the circumstances of these cases, I do not think that a Court of equity could or would compel the purchaser to complete them, and to register the shares in his name.

It seems to me, therefore, upon this ground, that the orders in these cases have gone too far, and must be discharged to that extent; but I am not disposed to alter them as to costs, and, of course, there will be no costs of the appeal.

SIR J. L. KNIGHT BRUCE, L. J., concurred.

Solicitors for Mr. *Emmerson:* Messrs. *Linklaters & Co.*
Solicitors for Colonel *Tombs:* Messrs. *Clarke, Son, & Rawlins.*
Solicitors for Mr. *Ward:* Messrs. *Head & Pattison.*
Solicitors for the Official Liquidator: Messrs. *Deane & Co.*

IMPERIAL BANK OF CHINA, INDIA, AND JAPAN *v.* BANK OF HINDUSTAN, CHINA, AND JAPAN.

L. JJ. 1866 June 12.

Practice—Security for Costs—Companies Act, 1862, *s.* 69.

Upon an application under s. 69 of the *Companies Act*, 1862 :—
Held, varying the order of *Wood*, V. C., that the security for costs given by a limited company is not confined to £100, but must be for an amount equal to the probable amount of costs payable.

THE bill in this case was filed by a company, registered and incorporated under the provisions of the *Companies Act*, 1862, as a limited company, and called the *Imperial Bank of China, India, & Japan* (*Limited*), and the Defendants were the *Bank of Hindustan, China, & Japan*, and *R. S. Tomlin*, their secretary. The bill was filed on the 5th of May, 1866, and on the 22nd of May, 1866, the Defendants moved before Vice-Chancellor *Wood* that the Plaintiffs should give security for costs; and an affidavit was filed in support of the motion, stating that the Plaintiffs' bank was in the course of voluntary liquidation, and that if the Plaintiffs were unsuccessful in this suit, their assets would not be sufficient to pay the costs of the Defendants.

On this motion the Vice-Chancellor *Wood* made an order "that the Plaintiffs do procure some sufficient person on their behalf to give security according to the course of this Court, by bond to the Clerk of Records and Writs, in the penalty of £100, conditioned to answer costs, in case any costs shall be awarded to be paid by the Plaintiffs." The Defendants appealed from this order, on the ground that the amount was insufficient.

Mr. *W. M. James*, Q.C., and Mr. *Eddis*, in support of the motion, relied on section 69 of the *Companies Act*, 1862, which enacts, that "where a limited company is Plaintiff or pursuer in any action, suit, or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the Defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given

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for such costs, and may stay all proceedings until such security is given." This enactment is clear that the security shall be sufficient, and says nothing about security according to the usual practice. Moreover, there is a good reason, for in an ordinary case the Defendant has his personal remedy against the Plaintiff whenever he comes into the jurisdiction. Here the Defendant has no remedy whatever if there are no assets. The section applies to every Court, and must have the same meaning in equity as at law, where the Master has to fix the probable amount: *French* v. *Maule* (1). The order of the Vice-Chancellor says nothing about sufficient security.

Mr. *G. M. Giffard*, Q.C., and Mr. *J. N. Higgins*, for the Plaintiff:—

In the Courts of the Master of the Rolls and the Vice-Chancellor *Wood* the old practice is followed, and the amount of security is limited to £100. This was fixed by the orders of 1828, and not altered in 1860. There is no such order at common law. Can it be intended that in each case, there shall be evidence as to the probable amount of costs, and perhaps an appeal? The word sufficient means merely that the security is to be sufficient, as in the usual form: *Australian Steam Ship Company* v. *Fleming* (2); *O. L. Southampton, &c., Steam Boat Company* v. *Pinnock* (3).

Mr. *W. M. James*, in reply, cited *Anon.* (4), where, on a Petition, there was no limit to the amount of security.

SIR J. L. KNIGHT BRUCE, L.J.:—

It appears to me that the word "sufficient" must have been intended to have a meaning, and that if the practice of the Court was to be followed the Act would have said so. There is nothing to limit the amount of the security.

SIR G. J. TURNER, L.J.:—

This is a special enactment under a special state of circumstances, and cannot be governed by any general rule which has

(1) 4 Man. & G. 107.
(2) 4 K. & J. 407.
(3) 11 W. R. 978.
(4) 12 Sim. 262.

reference to a different state of circumstances, and the rule of the Court does not apply to this case.

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After some discussion as to how the amount of security should be ascertained, their Lordships fixed it at £300. Costs of the application to be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Harrison & Lewis.*
Solicitors for the Defendants: Messrs. *Flux & Argles.*

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L. JJ.
1866
June 2.

Bankruptcy—Annulling Adjudication on Equitable Grounds.

Discussion of the circumstances requisite to justify the annulling of an adjudication on equitable grounds.

THIS was an appeal by the bankrupt from a decision of the Commissioner of the Bankruptcy Court of the *Birmingham* District, refusing to annul the adjudication.

The bankrupt had carried on business in partnership with *Henry Haines* and *William Morton.* The firm was heavily indebted to the *Birmingham & Midland Banking Company,* of which Mr. *Edmunds* was the manager, and *Upfill* owed the bank £487 on his private account. On the 3rd of October, 1865, the partners signed an agreement for dissolving the partnership on the 31st of December then next, and winding up the business. Shortly after this the firm took stock, and it appeared that the liabilities somewhat exceeded the assets, but *Upfill* disputed the accuracy of the stock taking, and denied the insolvency of the firm. In December a meeting was appointed at the office of the solicitors of the firm, at which *Edmunds* attended on behalf of the bank, but *Upfill* did not attend. At this meeting the result of the stock taking was mentioned, and it was suggested that *Haines,* who was the only monied man among the partners, should give *Upfill* a sum of money to go out of the concern, and the sum of

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£2000 was demanded on behalf of *Upfill*, to which *Haines* did not accede. Shortly after this meeting a writ of summons was issued by the bank against *Upfill* and his partners for £298, the amount of certain dishonoured bills of exchange, of which the bank were the holders. The writ was served on *Upfill* by solicitors who usually acted for *Morton* and *Haines*. On the 11th of January, 1866, judgment was recovered against the partners, and a *ca. sa.* was issued against *Upfill*, but no process was issued against either of his partners. In the same month of January, other meetings took place, at which the subject of *Haines* giving *Upfill* a sum of money to retire from the concern was discussed, and *Haines* went so far as to offer £1500, out of which *Upfill's* debt to the bank was to be paid, but the offer was declined. One of the witnesses examined on behalf of *Upfill*, stated that bankruptcy proceedings against *Upfill* were, at one of these meetings, threatened by *Edmunds*, if *Upfill* would not retire from the partnership. On the 30th of January *Edmunds* filed a petition for adjudication against *Upfill*, who was adjudged bankrupt, but afterwards obtained an order annulling the adjudication on the ground of some informalities. A fresh petition was then filed, upon which *Upfill* was again adjudged bankrupt. This adjudication *Upfill* applied to annul on grounds affecting its legal validity, also on the ground that the proceedings in bankruptcy had not been resorted to for the legitimate purposes of bankruptcy, but had been taken in collusion with *Haines* and *Morton* for the purpose of driving *Upfill* to retire from the firm. *Edmunds*, in his evidence, deposed distinctly that he had not taken the proceedings in bankruptcy with any view to the interests of the other partners, but solely with a view to obtaining administration of the bankrupt's estate to the greatest advantage of the bank and the other creditors. The learned Commissioner, after hearing the application, made an order confirming the adjudication.

Mr. *Bacon*, Q.C., and Mr. *Everitt*, for the bankrupt:—

It is clear upon the evidence that the object of these proceedings is to enable *Haines* and *Morton* to purchase *Upfill's* interest in the partnership at their own price. The proceedings then not having been taken for the legitimate purposes of bankruptcy the adjudi-

cation ought to be annulled: *Ex parte Browne* (1); *Ex parte Harcourt* (2); *Ex parte Bourne* (3); *Ex parte Phipps* (4).

Mr. *De Gex*, Q.C., and Mr. *Bardswell*, for the respondents were not called upon.

SIR J. L. KNIGHT BRUCE, L.J.:—

Two questions are before us — one as to the legal validity or invalidity of the adjudication, the other as to its equitable invalidity on the ground of alleged impropriety of motive. Apart from the alleged impropriety of motive, I think that the learned Commissioner's conclusion is clearly right. The question remains whether sufficient impropriety of motive is established for annulling the adjudication. Now, when all the legal requisites are shewn to exist, it requires a strong case to warrant the annulling the adjudication on the ground of a collateral motive. In the present case there appears considerable reason to think that there was a strong bias in the minds of *Upfill's* partners in favour of making him bankrupt and disposing of his contention against them by settling it in this way. But it seems to me that these facts do not constitute a sufficiently strong case for doing away with the legal effect of the adjudication. The partners were well disposed towards bankruptcy; but that is not enough; the legal requisites existing, the adjudication must remain.

SIR G. J. TURNER, L.J., after shortly disposing of the objections to the legal validity of the adjudication, continued:—

As regards the allegation that proceedings in bankruptcy were taken with an improper motive, and with the view of promoting the objects of the other partners, by driving *Upfill* to accept their terms, it must be observed that *Edmunds* stood in a peculiar position, for he had no prospect of obtaining payment of *Upfill's*

(1) 1 Rose, 151.
(2) 2 Rose, 203.
(3) 2 Glyn & J. 137.
(4) 3 M. D. & D. 505. The following cases were referred to by the learned Commissioner in his judgment: *Ex parte Christie* (2 D. & Ch. 488); *Ex parte Johnstone* (4 De G. & Sm. 204); *Ex parte Gallimore* (2 Rose, 424); *Ex parte Wilbeam* (Buck, 459); *Ex parte Parkes* (3 Deac. 31).

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separate debt, except by means of the proposed arrangement between *Upfill* and his partners. Under these circumstances I do not consider that we should be justified in imputing to *Edmunds* any motive different from the motive which he swears he had. I think, therefore, that the Appellant's case fails in both points.

Solicitors for the Appellant: Messrs. *Mackeson & Goldring.*
Solicitors for the Respondent: Messrs. *Beale, Marigold, & Beale.*

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ROBSON *v.* WHITTINGHAM.

Injunction—Light—Trivial Damage—Form of Decree—Reservation of Right to bring Action.

The Court will not grant an injunction to restrain the erection of a building on account of its obstructing the Plaintiff's light, unless the Plaintiff can show that he will sustain substantial damage. If he cannot do this, his ground of application to the Court fails, and no inquiry will be granted as to damages, and the bill will be altogether dismissed; but without prejudice to an action at law. Decree of *Kindersley*, V. C., reversed.

Clarke v. *Clark* (*ante*, p. 16) followed.

THIS was an appeal from a decree of Vice-Chancellor *Kindersley*.

The bill was filed by the owner and the tenant of No. 17, *Took's Court, Cursitor Street*, for an injunction to restrain the Defendant from completing a building which he was erecting on the opposite side of *Took's Court*, in such a manner as to interfere with the light and air enjoyed by the occupiers of the Plaintiffs' house.

It appeared from the evidence that the house of the Plaintiffs was situated on the east side, and that of the Defendant on the west side of *Took's Court*, which at that part is about fifteen feet wide. The height of the house which formerly stood on the site on which the Defendant had erected the building complained of, was about thirty feet, and on the north side of it was a small yard, which had a wall separating it from *Took's Court*, fourteen feet high, and with a frontage to the court of twelve feet. The Defendant pulled down the old house in August, 1864, and built a new house, which was unfinished when the bill was filed, but had

since been completed. The new building was about six feet higher than the old house, and also extended over the yard at the side.

The Plaintiffs' house was underlet from year to year to Mr. *Battershell*, a wood engraver, who carried on his business in the front room of the first floor. The ground floor was occupied by Mr. *Lawrence*, a law stationer. They both filed affidavits, stating that there was a sensible diminution of light, caused by the erection of the new building, and that they were inconvenienced in their business thereby. Mr. *Lawrence*, in particular, said that he was obliged to light the gas in his room earlier than formerly. The effect of their evidence is stated in the judgment of Lord Justice *Turner*. The building having been completed before the cause was heard, the Plaintiffs asked for damages only. The Vice-Chancellor being of opinion that the Plaintiffs were entitled to relief, made a decree on the 29th of July, 1865, granting an inquiry as to damages, which he directed to be paid by the Defendant. From this decision the Defendant appealed.

Mr. *Baily*, Q.C., and Mr. *F. T. White*, for the Plaintiffs, contended that the evidence shewed a material injury to the occupiers of the house. On the right to damages they referred to Sir *H. Cairns' Act*, 21 & 22 Vict. c. 27, and Mr. *Rolt's Act*, 25 & 26 Vict. c. 42.

Mr. *Glasse*, Q.C., and Mr. *Kay*, for the Defendant, contended that the obstruction to the light and air caused by the Defendant's building was so trivial that there was no ground for the interference of the Court of Chancery; and that being so, the Court would grant no relief in damages, but would leave the Plaintiffs to their remedy at law: *Clarke* v. *Clark* (1); *The Curriers Company* v. *Corbett* (2): *Durell* v. *Pritchard* (3); *Martin* v. *Goble* (4).

Mr. *Baily*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

I never differ from Vice-Chancellor *Kindersley* without hesita-

(1) *Ante*, p. 16.
(2) 13 W. R. 1056.
(3) *Ante*, p. 244.
(4) 1 Camp. 320.

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tion and mistrust. The material question here, as it seems to me, is whether any appreciable damage, any material damage, wrongful or not wrongful, has been proved to have been sustained by the Plaintiffs in consequence of the acts of which complaint is made. It appears to me that the mere circumstance of some diminution of light, as the Lord Chancellor has said, in a populous city, is not enough to create just cause for complaint. It appears to me that if *Clarke* v. *Clark* (1), had been decided before the hearing of this cause by Vice-Chancellor *Kindersley*, and if the observations of the Lord Chancellor in that case had been brought under the attention of the Vice-Chancellor, he would very probably have decided otherwise. Looking at the Lord Chancellor's observations in that case, and the evidence before us, I think that a material amount of damage has not been shown and therefore that there was not a sufficient ground for an injunction. The doubt I have is, whether, having regard to the two recent Acts of Parliament which have been referred to, the bill ought or ought not to have been dismissed without prejudice to an action at law. That is a point on which I reserve my opinion, but I think, with great deference to the Vice-Chancellor, that a case has not been established for a decree.

SIR G. J. TURNER, L.J.:—

I should have hesitated to differ from the Vice-Chancellor *Kindersley* in this case without having considered more carefully the affidavits, but that I am perfectly satisfied that if the cases of *Clarke* v. *Clark* (1), *The Curriers Company* v. *Corbett* (2), and *Durell* v. *Pritchard* (3), had been determined before the case came before the Vice-Chancellor, and had been brought to his attention, he would not have made the decree appealed from. Right or wrong, those authorities must govern the Court; but I may say, that for myself, I am most entirely satisfied with the Lord Chancellor's judgment in *Clarke* v. *Clark*. I think that this class of cases had been carried too far before the decision in *Clarke* v. *Clark* was pronounced. In the present case what is the evidence as to the light? Mr. *Lawrence*, who occupies the ground floor of

(1) *Ante*, p. 16. (2) 13 W. R. 1056. (3) *Ante*, p. 244.

the house, does not say to what extent he has been obliged to light the gas earlier than before: and in the case of *Durell* v. *Pritchard* I think that there was evidence that they had been obliged to light the gas an hour earlier than they were before; and yet we thought that was not a case to interfere. Mr. *Lawrence's* apprentice only says that the light was "considerably obstructed;" but what the meaning of "considerably obstructed," is in his judgment, there is nothing to enable us to form any opinion. I do not think that, independently of that evidence, there is any case, because I cannot go the length of saying that Mr. *Battershell's* evidence is sufficient to determine the question: for in truth he almost admits in his affidavit, that by changing the position of his table from the middle of the room to the window, he is able to go on with his work just as well as before.

It seems to me, therefore, that there has been a failure of evidence, and that takes the case out of Equity: the bill has been improperly filed, and must therefore be dismissed. But I have no objection to it being dismissed without prejudice to an action. I understand that in some recent cases the Courts of law have considered that the jurisdiction being now open in this Court, the questions must be taken to have been already fully disposed of in a Court of competent jurisdiction. On that account it will be better to insert the words "without prejudice to such right, if any, as the Plaintiffs may have to bring an action at law." The Vice-Chancellor's opinion has so much weight, that we dismiss the bill without costs, and there will be no costs of the appeal.

Solicitor for the Plaintiffs: Mr. *Dalston*.
Solicitors for the Defendant: Messrs. *Cunliffe & Beaumont*.

Cf. Le Weeks v. Lady Downington Hospital
12 W. R. 274: 12 Jur. N. S. 347, 349.

L. JJ.
1866
March 8, 9, 10;
May 28.

TOWNEND *v.* TOKER.

Voluntary Settlement—Statute 27 Eliz. c. 4—Consideration—Practice—Parties.

A lady, who was entitled in fee to an estate subject to mortgages, proposed to her nephew that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this, provided she would settle the estate, limiting it to him after her death. She agreed to this, and a settlement was accordingly executed by which the nephew covenanted to indemnify her from all liability in respect of the mortgages, except the payment of the interest during her life. He removed to a larger house at considerable expense, and they lived together for some time. The aunt afterwards ceased to live with the nephew, and agreed to sell the estate to a purchaser, who filed a bill against the aunt and nephew for specific performance:—

Held, reversing the decree of the Master of the Rolls, that the settlement was not voluntary; the covenant of indemnity and the expenses incurred by the nephew on the faith of the settlement being severally sufficient to support it as made for value.

Semble, that had the settlement been voluntary, and so void against a purchaser, the nephew would have been a proper party to the suit, but could not have established any claim to the purchase money.

THIS was a suit for specific performance of an agreement entered into in April, 1863, for the sale to the Plaintiff of an estate, which at the time when the agreement was entered into was the subject of a settlement alleged by the purchaser to have been voluntary, and to be void as against him. The principal Defendants were *Margaret Grace Toker*, the vendor and settlor, and *Philip Champion Toker*, who claimed under the settlement to be entitled in fee to the estate, subject to a prior life interest limited by the settlement to the Defendant *M. G. Toker*, the vendor. There was another Defendant, claiming under another deed executed by the settlor, but as she did not dispute the Plaintiff's right, nothing need be stated as to her title.

The settlement under which the Defendant, *P. C. Toker*, claimed to be entitled to the estate, was made on the 16th of November, 1853. At that time the Defendant *M. G. Toker* was entitled in fee to the estate, subject to several mortgages affecting different

parts of it, amounting to upwards of £6000, and by the settlement she, "in consideration of the natural love and affection which the said *Margaret Grace Toker* has and bears for and towards the said *Philip Champion Toker*, and of the covenant and agreement hereinafter entered into by the said *Philip Champion Toker*, with the said *Margaret Grace Toker*," and for a nominal consideration, conveyed the estate to *Richard Bathurst* and his heirs, to hold, subject to the mortgages affecting the different parts thereof, to the use of the Defendant, *M. G. Toker*, and her assigns, during her life without impeachment of waste, and after her decease to the common uses to bar dower in favour of *P. C. Toker*. The Defendant, *P. C. Toker*, by the settlement covenanted for himself, his heirs, executors, and administrators, with the settlor, her heirs, executors, and administrators, that he, the Defendant, *P. C. Toker*, his heirs, executors, and administrators, appointees, or assigns, would pay or discharge the several charges, debts and incumbrances, then charged or secured upon the estate, and all interest which should grow due in respect thereof from and after the decease of *M. G. Toker*, but not including any interest, annuity or annuities, rent-charge or rent-charges then due, and which should accrue due during the life of *M. G. Toker*, and that he, the said Defendant, *P. C. Toker*, his heirs, executors, administrators, appointees, or assigns, would or should at all times thereafter effectually keep harmless and indemnified *M. G. Toker*, her heirs, executors, and administrators, and her and their lands and tenements, goods and chattels, from and against the several charges, debts, and incumbrances then charged or secured upon the estate, and all interest to grow due in respect thereof as aforesaid from and after the decease of *M. G. Toker*, but not including any interest, annuity or annuities, rent-charge or rent-charges then due, or which should accrue due during the life of the Defendant *M. G. Toker*; and also from and against all and all manner of actions, suits, and other proceedings whatsoever, which at any time or times thereafter should or might be brought, had, commenced, or prosecuted, against *M. G. Toker*, her heirs, executors, or administrators, and also all costs, charges, damages, and expenses which she or they should or might bear, pay, sustain, expend, be at, or be put unto, for or by reason of the non-payment, or non-satisfaction of the several

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charges, debts, and incumbrances then charged or secured upon the said hereditaments and premises thereby granted, or intended so to be, or of the interest which should accrue due in respect thereof as aforesaid from and after the decease of *M. G. Toker*, but not including any interest, annuity or annuities, rent-charge or rent-charges then due, and which should accrue due during the life of *M. G. Toker*. Provided always, and *M. G. Toker* thereby declared, that the above covenant and agreement on the part of *P. C. Toker* should not absolve *M. G. Toker*, her heirs, &c., from payment of any interest, annuity or annuities, rent-charge or rent-charges then due, and which should accrue during the life of *M. G. Toker*, and should be charged on the estate; and that if *P. C. Toker*, his heirs, &c., should at any time or times during the life of *M. G. Toker* pay off or discharge any principal sum or sums of money then charged upon the estate, she, *M. G. Toker*, her heirs, &c., would pay to the person or persons paying off the same, his, her, or their executors, administrators, or assigns, the interest which, during the life of *M. G. Toker*, would from time to time have accrued on the principal sum or sums so paid off if the same had not been paid off, and at such rate of interest as should be payable thereon respectively at the time of the discharge thereof.

This settlement having been disclosed in the course of the investigation of the title, the Plaintiff filed the bill in this suit, alleging that he had had notice of the deed of the 16th of November, 1853, after the conclusion of his contract for purchase, and that he could not safely complete his contract without the concurrence of the Defendant, *P. C. Toker;* and charging that the deed of the 16th of November, 1853, was voluntary and without consideration, and was void against him as a purchaser for valuable consideration, and therefore praying that the Defendant, *M. G. Toker*, might be decreed specifically to perform the agreement for sale, and to convey the estate to the Plaintiff free from incumbrances, with a good and marketable title thereto, and that the Defendant, *P. C. Toker*, and all other necessary parties, might be decreed to concur in the conveyance to the Plaintiff, and that if necessary and proper, the settlement might be delivered up to the Plaintiff to be cancelled.

The Defendant, *M. G. Toker*, by her answer insisted that the deed of the 16th of November, 1853, was a mere voluntary settlement made without any good or valuable consideration, and stated that she had always been ready and willing to perform her contract with the Plaintiff so far as under the circumstances it was in her power to perform it. She further alleged that the Plaintiff had notice of the deed of the 16th November, 1853, before the contract with her was entered into, and that that deed was not executed by *P. C. Toker* until the month of September, 1859.

The Defendant *P. C. Toker* by his answer set forth in great detail the circumstances which led up to, and followed upon, the deed of the 16th November, 1853, what he stated being in substance this—that the *Oaks Estate* formed the principal portion of the property comprised in the deed—that this estate had been in the possession and occupation of his family for many years as their family residence, and that upon the death of his father in the year 1849 he succeeded to it as the eldest son and heir of his father, who was the eldest brother of the Defendant *M. G. Toker*—that in the year 1852 he determined to sell the estate, and at the instance of *R. Bathurst*, who was the family solicitor, and had for many years acted as the solicitor of the Defendant *M. G. Toker*, offered the estate to her, as she had often expressed her anxiety that it should be retained in the family, and her desire to become the purchaser rather than allow it to pass into the hands of strangers —that she accordingly became purchaser of the estate, which was conveyed to her in April, 1852—that in April, 1852, he took up his residence at No. 129, *Marine Parade, Brighton*, which he had taken on lease for seven years, and had fitted up and furnished for the accommodation of himself and family; that the Defendant *M. G. Toker* was then, and had for some years previously, been residing with her brother, *J. B. Toker*, at No. 67, *Marine Parade*, but that in May, 1853, *J. B. Toker*, who had then fallen under the influence of *Madame de Burgh* and of *E. A. Glover*, and had been induced by them to embark in various speculations, had been persuaded by them to leave *Brighton* and go up and live with them at *Maida Hill*—that after *J. B. Toker* had gone to reside with *Madame de Burgh* and *E. A. Glover*, they urged *M. G. Toker*

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to quit *Brighton* and go and live with them, and to entrust her affairs to *E. A. Glover*, but that *M. G. Toker* continued to reside at No. 67, *Marine Parade*, until the 28th October, 1853, when in consequence of the annoyances occasioned by the conduct of *A. de Burgh* and *E. A. Glover*, she removed thence, and came to stay at *P. C. Toker's* house for a time as a visitor; that a few days after she had come to his house she entered into conversation with him about her future plans, and said that she should like to reside with him for the future if he had no objection, but was afraid that his house at *Brighton* was not sufficiently large to accommodate herself and her servants, and she then referred to the circumstance of the house at the *Oaks* being vacant, and expressed her desire that they should all go and live there—that he then promised to consider the matter, and to let her know his views upon it—that before he came to a conclusion upon the subject she had told him that she intended to secure all her property in *Kent* to him after her death, and informed him that she had done so by her will—that upon fully considering the subject he came to the conclusion that as the will might at any time be revoked, and a different disposition made of the property, he should not be justified in incurring, and in fact, that having regard to his family he was not then in a position to afford, the outlay and liability which must be incurred by him in the event of removing to the *Oaks* without being secured against a change of intention on her part—that on the following day she recurred to the subject of their going to live at the *Oaks*, and he then told her that he could not afford to incur the risk and expense which a removal from *Brighton* to the *Oaks* would involve without being secured against a change taking place in the intention which she had expressed to secure the property in *Kent* to him after her death, and she, upon being told that the will was no security, and that the only way in which the property could be secured to him after her death was to make a settlement of it by deed, expressed her desire that Mr. *Bathurst* should at once prepare the necessary deed for the purpose, and that some further conversation took place with reference to the proposed deed and their joint occupation of the *Oaks*, and it was ultimately arranged that as soon as the deed was prepared and executed the house at the *Oaks* should be put into complete repair, and properly fitted

up and furnished for the reception of the settlor, and *P. C. Toker* and his family, and that as soon as circumstances would permit they should leave *Brighton* and go and live together at the *Oaks*, that in consideration of such deed being executed by the settlor, he agreed that the principal portion of the furniture of his house at *Brighton* should be taken to the *Oaks* for the purpose of furnishing the house there, and that half the expense of any additional furniture which might be required, as well as of all the repairs and alterations, should be paid by *P. C. Toker*, who also agreed to take upon himself the whole expenses of housekeeping, and of the establishment generally, the settlor undertaking to pay him £200 a-year as a contribution thereto.

The answer then proceeded to detail the circumstances attending the preparation and execution of the deed, and it then stated that immediately after the execution *P. C. Toker* proceeded to carry out the arrangement on his part, and removed to the *Oaks* a large quantity of his furniture, and ordered furniture, goods, and repairs to a large amount for fitting up the house for the accommodation of *M. G. Toker* and himself and family; that about the end of the second week in December, 1853, *M. G. Toker*, with part of *P. C. Toker's* family, went to live at the *Oaks*, and shortly afterwards, as soon as the repairs were completed and the house ready, other members of his family and servants went thither, but he and his wife were detained for a time at *Brighton* in consequence of the severe illness of one of his daughters; and that the occupation of the *Oaks* by *M. G. Toker* and by *P. C. Toker* and his family, according to the arrangement, continued from the time when *M. G. Toker* went there till the 7th of March, 1854, on which day she left without any notice, and went to reside with *A. de Burgh* and *E. A. Glover*, and as soon as he could make the necessary arrangements for the removal of his household and the sale of his furniture (the whole of which had to be sold by auction) he quitted the *Oaks* and gave up possession to *M. G. Toker*. He went on to state, that in 1859 she had filed a bill against him to set aside the settlement, as obtained by fraud and undue influence, which bill was dismissed at the hearing on the 3rd of December, 1862 (1) and the order affirmed by the Lords Justices on the 8th of May, 1863. (2) He proceeded to assert his title under the settlement,

(1) Reported 31 Beav. 629; 9 Jur. N. S. 370
(2) Reported 3 De G. J. & S. 487.

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and to allege that the settlement was not voluntary, but was executed by *M. G. Toker* for valuable consideration, and that the above-mentioned arrangement made between them prior to its execution, and the special covenants on his part contained therein constituted such valuable consideration; and he submitted that no decree prejudicing him or his interest in the estates could or ought to be made in this suit, and that the Plaintiff ought to pay him his costs. He further submitted that even if the Plaintiff should be held entitled to specific performance by reason of the settlement being deemed to be void as against him as a purchaser, it was valid as against *M. G. Toker*, and that in such case the purchase money ought to be substituted for the property, and treated as subject to trusts similar to the limitations of the settlement, and be brought into Court and properly secured and applied accordingly.

The evidence on the part of *P. C. Toker* was stated by the Lord Justice *Turner* to establish fully the fact that he removed with his family from *Brighton* to the *Oaks* upon the terms of the settlement in question being executed, and that but for its being executed he would not have so removed, and further, that he incurred considerable expense and loss in consequence of such removal.

The case was heard before the Master of the Rolls in May, 1865, and on the 1st of June following His Lordship made a decree declaring the Plaintiff entitled to specific performance, and ordering that upon the Plaintiff paying the purchase money to the Defendant, *M. G. Toker*, or as she should direct, she and all other proper parties, at the expense of the Plaintiff, should respectively execute a proper conveyance of the estate to the Plaintiff, or as he should direct, such conveyance to be settled by the Judge in case the parties should differ. It was declared that the Plaintiff was a purchaser within the meaning of the Act 27th Eliz. c. 4, and that the settlement of the 16th November, 1853, was void as against him, and it was ordered that *P. C. Toker*, and all other proper parties, should respectively convey and assure, or concur with the Defendant, *M. G. Toker*, in conveying and assuring the estate to the Plaintiff, or as he should direct. *P. C. Toker* appealed from the whole of this decree.

Mr. *Southgate*, Q.C., and Mr. *Plummer*, for the Plaintiff, in support of the decree:—

The contract with the Plaintiff being a *bonâ fide* purchase for value, will be enforced by the Court, notwithstanding notice of the settlement, unless the settlement can be shewn not to be voluntary: *Buckle* v. *Mitchell* (1); *Willatts* v. *Busby* (2); *Daking* v. *Whimper* (3). Then as to the considerations alleged. The law imposes on the grantee of a mortgaged estate an obligation to pay the mortgage and indemnify the grantor against it: *Waring* v. *Ward* (4); *Tweddell* v. *Tweddell* (5); *Barham* v. *Earl Thanet* (6); *Earl of Oxford* v. *Rodney* (7); *Barry* v. *Harding* (8); *Dart*, Vendors and Purchasers (9). Now an express covenant to do what the law would bind the grantee to do without it cannot create a consideration. If the argument on the other side is to prevail, it will be impossible to make a voluntary settlement of an equity of redemption. The second consideration alleged is, that there was an agreement for the settlor and *Philip Champion Toker* to live together, and that he performed his part of it. But that was an independent arrangement, resting on a consideration of its own, and cannot be imported into the settlement. It was an arrangement not capable of being enforced, and it was not made till after the settlement had been executed. The purchase money ought to be paid to the vendor, not to the volunteers: *Evelyn* v. *Templar* (10); *Pulvertoft* v. *Pulvertoft* (11); *Daking* v. *Whimper* (3).

Mr. *Baggallay*, Q.C., and Mr. *W. H. Clark*, for the Appellant:—

There is no equity against *P. C. Toker*, and the Plaintiff has no right to bring him before the Court, whether the settlement be voluntary or not. Where the legal estate is outstanding, so that the sale for value sets aside only equitable interests, it is necessary that the parties claiming under the voluntary settlement should be

(1) 18 Ves. 100.
(2) 5 Beav. 193.
(3) 26 Beav. 568.
(4) 7 Ves. 336.
(5) 2 Bro. C. C. 100; and see 3 Ves. 131.
(6) 3 My. & K. 607.
(7) 14 Ves. 417.
(8) 1 J. & Lat. 475, 485.
(9) 3rd ed. p. 359.
(10) 2 Bro. C. C. 147.
(11) 18 Ves. 84, 91.

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before the Court, in order that it may be effectually decided to whom the trustees must convey, as in *Buckle* v. *Mitchell* and *Willatts* v. *Busby*. But here, where no trustees are interposed, the conveyance not being to trustees in trust for Miss *Toker* for life, with remainder in trust for *P. C. Toker*, but directly to the use of Miss *Toker* for life, remainder to the use of the nephew in fee, those cases do not apply. The rule is, that you cannot mix up in a specific performance suit a person claiming an adverse title, for the purpose of establishing the title against him: *Tasker* v. *Small* (1); *Mole* v. *Smith* (2); and the Court, which does not favour the setting aside voluntary settlements, *Smith* v. *Garland* (3), will not facilitate it by making this an exception to the rule, the statutory fraud standing on quite a different footing from actual fraud: *Bennett* v. *Musgrove* (4). There is no title to relief in equity against us: *De Hoghton* v. *Money* (5). But supposing this objection not to be valid, we say that the Plaintiff's case must fail on the ground that the settlement was not voluntary. We contend that there is a sufficient consideration on the face of the deed, and that a sufficient collateral consideration is also shewn. The covenant to indemnify the settlor against the mortgages is a consideration. We admit the authority of the cases cited as to the obligation of a purchaser to indemnify the vendor against mortgages on the property; but such cases have only a very limited application to a case like the present, where the covenantor takes only an estate in remainder. There is no authority for holding that, apart from the covenant, *P. C. Toker* would be bound in any way to indemnify the settlor during her life. The covenant, then, is a consideration: *Ford* v. *Stuart* (6); *Stephens* v. *Olive* (7). A slight consideration will support a settlement as made for value: *Thompson* v. *Webster* (8); *Roe* v. *Mitton* (9). Here the consideration is substantial. Again, a settlement will be treated as made for value if there be a consideration for it, though not appearing on its face: *Clifford* v. *Turrell* (10); *Pott* v. *Todhunter* (11);

(1) 3 My. & Cr. 63.
(2) Jac. 490.
(3) 2 Mer. 123.
(4) 2 Ves. Sen. 52.
(5) Law Rep. 1 Eq. 154.
(6) 15 Beav. 493.
(7) 2 Bro. C. C. 90.
(8) 4 De G. & J. 600; 9 W. R. 641, D. P.
(9) 2 Wils. 356.
(10) 1 Y. & C. Ch. 138.
(11) 2 Coll. 76.

Gale v. *Williamson* (1); even if the consideration be *ex post facto*: *Johnson* v. *Legard* (2). If the settlement be set aside as voluntary, the purchase-money must be held upon trusts corresponding to the limitations of the settlement: *Ferrars* v. *Cherry* (3); *Leach* v. *Dean* (4).

[*Parry* v. *Carwarden* (5); *Fletcher* v. *Fletcher* (6); *Ward* v. *Audland* (7); *Cox* v. *Barnard* (8); were also referred to with regard to the rights of a volunteer.]

Mr. *Fischer*, for the settlor:—

A devisee of the estate must have taken it *cum onere* and indemnified everybody; and why should a donee *inter vivos* be in a better position? The covenant then does not go beyond the liability which would exist without it. In *Ford* v. *Stuart* value was given for the settlement, which distinguishes that case from the present. Then as to the arrangement for living together, it would be contradicting the terms of the deed in this case to import that as a consideration; so *Clifford* v. *Turrell* (9) does not apply. The question of right to the purchase money is covered by the authorities. Such a right must rest on the granting part of the deed, or on the covenant for further assurance. The granting part gives the grantee the estate or nothing. There is no covenant, as in *Evelyn* v. *Templar* (10), to settle the money if the estate is sold. Then the covenant for further assurance only gives a right to sue at law, but does not create a lien. In *Evelyn* v. *Templar* there was a covenant which raised a fair question whether there was not a lien, but the Court decided against it, saying that the statute avoided the deed. In *Pulvertoft* v. *Pulvertoft* (11), Lord *Eldon* treats it as settled that the volunteer has no claim against the purchase money; and in *Daking* v. *Whimper* (12) it was so decided. The purchaser is entitled to file a bill against the volunteers as well as the vendor: *Buckle* v. *Mitchell* (13); *Holford* v. *Holford* (14).

(1) 8 M. & W. 405.
(2) T. & R. 281, 294.
(3) 2 Vern. 383.
(4) 1 Ch. Rep. 78.
(5) 2 Dick. 544.
(6) 4 Hare, 67.
(7) 16 M. & W. 862.
(8) 8 Hare, 310.
(9) 1 Y. & C. Ch. 138.
(10) 2 Bro. C. C. 147.
(11) 18 Ves. 84.
(12) 26 Beav. 568.
(13) 18 Ves. 100.
(14) 1 Ch. Ca. 216.

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Mr. *Southgate*, in reply :—

It is contended on the other side that we cannot bring the volunteers here to try the question whether the deed is voluntary, and it is attempted to get over the decisions to the contrary by referring them to the circumstance that the legal estate was outstanding. If that was the ground of those decisions, we can claim the benefit of them, for the legal estate here is outstanding in the mortgagees; and the question who has the right to redeem is proper for decision in this Court. But the judgment in *Buckle* v. *Mitchell* clearly shews that the decision did not turn on any such ground. The Court of Chancery has jurisdiction in all cases of fraud; and the setting aside of deeds under the statute 27 Eliz. c. 4 turns on fraud: *Doe* v. *Manning* (1). The other side say, "Try your title at law." But it is impossible to try the title to an equity of redemption at law. The Court has interfered in various cases where the estate has not been conveyed to trustees, but directly to the volunteers: *Leach* v. *Dean* (2); *Douglas* v. *Ward* (3); *Parry* v. *Carwarden* (4); *Stackpoole* v. *Stackpoole* (5). It appears from *Kerrison* v. *Dorrien* (6), that a Court of law does not recognise anything short of a legal conveyance for value. The general rule in *Tasker* v. *Small* (7) is not disputed; but there are exceptions to the rule, and this is one: *Lister* v. *Turner* (8). Moreover a case where a third person sets up a claim to the purchase money must be an exception. In *Tasker* v. *Small* the person held to be improperly made a party had a title paramount. Then, as to consideration, it is evident that the framer of this deed only contemplated a free gift, and the covenant for further assurance was only a covenant to do all that was requisite to complete the gift. The Court, no doubt, will not weigh the consideration nicely, but there must be a substantial consideration. *Roe* v. *Mitton* (9) and *Ford* v. *Stuart* (10), where a very trifling consideration was held enough, were cases where something was wanted from a third person; but where the consideration moves only from the grantee,

(1) 9 East, 59.
(2) 1 Ch. Rep. 78.
(3) 1 Ch. Ca. 99.
(4) 2 Dick. 544.
(5) 4 D. & War. 320.
(6) 9 Bing. 76.
(7) 3 My. & Cr. 63.
(8) 5 Hare, 281, 291.
(9) 2 Wils. 356.
(10) 15 Beav. 493.

it must be substantial (1). *De Hoghton* v. *Money* (2) is under appeal.

May 28. SIR G. J. TURNER, L.J., after stating the facts, continued:—

The first point relied upon in support of this appeal was, that the validity or invalidity of the settlement in question as against the Plaintiff could not properly be tried in this suit; that the Plaintiff was not entitled to make the persons interested under the settlement parties to a suit of this description. It is not necessary for us, in my opinion, to decide this point; nor do I mean to bind myself to any final opinion upon it; but the strong inclination of my opinion is, that this objection on the part of the Appellant cannot be maintained. It is, no doubt, true that in ordinary cases of suits for specific performance, the vendor and purchaser are the only proper and necessary parties to the suit; but in a case of this description the settlement, if voluntary, is fraudulent and void against the purchaser, and the purchaser, who is, of course, entitled to the best title which the vendor can make, must, it should seem, be entitled to have the question tried whether the settlement is voluntary or not. That is a question which cannot be tried between the vendor and the persons interested under the settlement, for the settlement is binding upon the vendor. It is a question which can be tried only by the purchaser, and, if to be tried with him, I see no reason why it should not be tried in a suit for specific performance, rather than be made the subject of a distinct and separate suit, the more so, as it is a question which affects the validity no less than the performance of the contract. Such a case does not, it is to be observed, stand upon the same footing as the ordinary case, in which it is doubtful whether the vendor has power to sell, and in which the Court might dismiss the bill upon the ground of that doubt; for to deal with a case like the present upon that footing would go far to destroy the effect of the statute as applied to voluntary settlements, as no purchaser would take the title without being satisfied that the settlement was invalid against him; and it would, there-

(1) Sug. V. & P. 14th ed. 719. (2) Law Rep. 1 Eq. 154.

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fore, to say the least, be difficult to effect any sale of property comprised in such a settlement. There is enough, therefore, as it seems to me, to distinguish cases of this description from the ordinary cases of specific performance; but at all events it appears to have been the constant practice of the Court to make persons interested under settlements alleged to be voluntary, parties to suits of this description, and I am not disposed to alter that practice. It was argued for the Appellant that the purchaser takes his title under the statute, which avoids the voluntary settlement against him, and that the cases in which the parties interested under the settlement have been made parties to suits for specific performance have been cases in which the legal estate was outstanding in trustees; but although the purchaser takes his title under the statute, he is not the less entitled to the best title which his vendor can make him; and as to the cases, they have not all proceeded upon the ground suggested, nor do I think that it is a sound ground upon which to proceed, for if all the *cestuis que trusts* be volunteers, I apprehend the conveyance to the trustees would be void against the purchaser no less than the interests of the *cestuis que trusts;* otherwise in every case of a voluntary settlement, in which the legal estate was vested in trustees, the trustees would, by force of their legal estate, be entitled to recover or hold at law against the purchaser.

The substantial question, however, in this case is, whether the settlement in question was voluntary, and fraudulent and void against the Plaintiff. The Master of the Rolls was of opinion that it was, and has decided the case accordingly, but with all respect to His Lordship I differ from him in opinion upon this point. The question, as I apprehend, in cases of this description is, whether there was consideration for the settlement. The Court not entering into the quantum of consideration, in effect the question is, whether the transaction was one of bargain or of gift merely, and I am of opinion that there was consideration for this settlement, and that the case is one of bargain and not of gift merely. The settlement purports to be made in consideration, not of natural love and affection only, but of the covenants contained in it on the part of *P. C. Toker.* Under those covenants if any of the persons having debts, charges, or incumbrances

affecting the estate should take proceedings against it in the lifetime of *M. G. Toker*, the Defendant, *P. C. Toker*, would be bound to indemnify her against those proceedings, and all costs and expenses consequent upon them. If therefore any of the mortgagees called for payment in the lifetime of *M. G. Toker*, the Defendant, *P. C. Toker*, would be compelled either to procure some one to take a transfer of the mortgage, or to raise the money necessary for the discharge of it. In the case of a transfer the expenses of the transfer would fall upon him. In the case of the money being raised he might be obliged to pay interest exceeding the interest secured by the mortgage, but he could only charge *M. G. Toker* with interest at the latter rate. *M. G. Toker*, the settlor, was in effect by this deed placed in the position of having during her life the whole income of the estate, subject only to interest at the rate then payable upon the charges, and she was placed in this position at the risk and expense of the Defendant, *P. C. Toker*. It was said for the Plaintiff that the Defendant, *P. C. Toker*, came under no further liability than the law would have imposed upon him, and several cases were cited upon this point, but I can find nothing in those cases which can affect a case like the present, which is not a case of sale, but of settlement; nor do I see any principle which can throw upon a reversioner the obligation of indemnifying a tenant for life. How this case might have stood if it had been alleged and proved that these covenants were inserted in the deed only for the purpose of raising a consideration for it, it is unnecessary for us to say. There is no such allegation or proof.

I think, therefore, that upon the face of this deed itself there is enough to take the case out of the operation of the statute, but assuming this point to be open to doubt, there is no doubt that evidence is admissible to shew that there was consideration for the deed not appearing upon the face of it, and it seems to me that there is here sufficient proof of such consideration. The evidence, as I have said, fully satisfies my mind that the Defendant, *P. C. Toker* removed with his family from *Brighton* to the *Oaks*—that he agreed to incur, and did incur considerable expense by reason of such removal, and that he subjected himself to increased expense in residing at the *Oaks*, upon the faith of this settlement

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being executed, and that he would not have done so unless this settlement had been made, and I am of opinion that these circumstances also are sufficient to take the case out of the statute. The case of *Stiles* v. *The Attorney-General* (1), bears strongly on this point. In that case Dr. *Young* had quitted the family of Lord *Exeter*, and had refused an annuity of £100 a year, which had been offered him to continue as a tutor in that family, upon the solicitation of the Duke of *Wharton*, and assurances on his part that he would provide more amply for him, and an annuity given by the Duke of *Wharton* to Dr. *Young* was upheld against the duke's creditors, Lord *Hardwicke*, after referring to the facts which I have stated, saying: "If this be the truth of the fact, and it is nowhere contradicted, it does certainly amount to a valuable consideration, for it has been truly said that it will equally arise where a person gives up a certain pecuniary advantage at the time of the grant as where a sum of money is actually paid down at the time." The view which I have taken upon this point is also supported by *Doe* v. *James* (2) and *Bullock* v. *Sadlier* (3). It was argued for the Plaintiff that the agreement for residence at the *Oaks* was wholly distinct from the agreement for the settlement, and was not concluded until after the settlement had been executed; but in my opinion the evidence shews that it was the foundation of the settlement, although the precise terms of the arrangement may not have been fully settled before the settlement was made. Again, it was said that if this agreement had been part of the consideration for the settlement, it would have been mentioned in the deed, but this argument goes too far; if followed out to its consequences it would go to the extent of excluding any consideration not appearing upon the face of the deed.

Another point which was much discussed in the course of the argument before us was, whether, assuming the settlement to be set aside, the purchase-money ought not to be held subject to the same trusts to which the estate would have been subject, but upon this point also it is unnecessary for us to give any opinion. I have thought it right, however, to mention the point, as I have been kindly furnished by a gentleman in the Record Office with a

(1) 2 Atk. 152. (2) 16 East, 212. (3) Amb. 764.

copy of the decree in *Leach* v. *Dene* (1), from which it appears that the purchase-money was so dealt with in that case; but the later cases are so much the other way, both in point of decision and of *dicta*, that we should not in my opinion be justified in acting in

(1) The following is a copy of this decree with the spelling modernized:

Between RICHARD LEACH . . . . . Plaintiff
and
RICHARD DENE, ROGER DENE, son of the said RICHARD DENE, JOHN WEBB, and ROBERT COCKRAM . . . . . Defendants.

Reg. Lib., B. 1640, 577.

THIS cause being heard the 24th of May last, before Mr. Justice *Foster*, the substance of the Plaintiff's suit being to have certain articles of agreement made between the Plaintiff and the said *Richard Dene*, to be performed concerning the purchase of two little manors called *Whitbeard* and *Veins*, for the which the Plaintiff was to pay to the said *Richard* £1325, and that the premises might be assured to the Plaintiff accordingly, was the effect of the bill; but in regard, the greatest difficulty in the said cause at the hearing, arose out of a deed which the Defendant then produced, and which deed neither the Plaintiff nor his counsel had ever view of before. It was then ordered that the said deed should be produced before Mr. *Page*, one, &c., who should state the case upon the said deed, and certify what estates, uses, trusts, or powers were thereby limited; which the Master having accordingly done, made his report, thereby certifying the particular uses, trusts, and covenants in the said deed contained; and afterwards, upon the 9th day of June last, upon the motion of the Plaintiff's counsel, and upon the reading of the said Master's report, it was by the said Judge ordered, for the reasons in the order and report contained, that the articles in the said order upon the hearing mentioned should be decreed, and the Defendant, *Richard Dene*, the trustees, *John Webb* and *Robert Cockram*, and the said *Roger Dene*, should all join in the conveyance of the lands in question unto the Plaintiff, according to the said articles and bargain made with the said *Richard Dene*, unless the Defendant, having notice thereof, should by the first day of this last term shew good cause to the contrary; and now the matter being this day debated before the Right Honourable the Lord Keeper, in the presence of the counsel on both sides upon the whole matter, his Lordship being assisted by Mr. Justice *Foster* and Mr. Justice *Heath*, forasmuch as the articles made between the Plaintiff and the Defendant *Richard* are by answer confessed, and the tender of the money by the Plaintiff is proved, the said Lords the Judges declared that the said deed of uses bearing date in August, 15 *Caroli*, being a voluntary conveyance, and the said *Richard Dene* who made the same afterwards selling the premises unto the Plaintiff for valuable consideration, the said voluntary conveyance is fraud within the statute, and the tendering of the money by the Plaintiff is as good a performance of the contract on his part as if the money were paid, the Defendant *Richard Dene* having refused to accept thereof, and therefore held fit that the Defendant *Richard* should make good and perform his contract, and perfect the assurance accordingly; the rather for that the Defendant *Richard* doth by his answer offer

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opposition to them. If they are not well founded it is for the House of Lords, and not for us, to correct them. This bill ought, in my opinion, to be dismissed as to the Defendant, *P. C. Toker*, with costs, and as to the other Defendants without costs.

SIR J. L. KNIGHT BRUCE, L.J.:—My opinion is the same.

Solicitors for the Plaintiff: Messrs. *Langford & Marsden.*
Solicitor for the Appellant: Mr. *H. Philipps.*
Solicitors for the Defendant *M. G. Toker*: Messrs. *White & Sons.*

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the same so as he might have a further consideration; and for the Defendant *Roger Dene*, it is but just that he should be in the same case with his father, as if his father had never made the voluntary conveyance, for so much as is between the Plaintiff and his father; but for the trustees, they ought in all justice and equity to be freed and saved harmless, and discharged of their debts and trusts. His Lordship doth thereupon order and decree that the said articles of agreement made between the Plaintiff and the Defendant, *Richard Dene*, be in every part performed according to the true intent and meaning thereof; and the said *Richard Dene* shall make assurance of the premises, and free the same of incumbrances accordingly; and the said *Roger*, the son, is to be subject to this decree, according to the said articles of agreement made between his father and the Plaintiff; but for the conveyance in August, 15 *Caroli*, the same is not hereby impeached as between the Defendants, the father and the son, for any advancement or other charge thereby settled on the said *Roger*, the son, otherwise than for making good the said articles of agreement made as aforesaid between the Defendant, *Richard Dene*, and the Plaintiff; but the said trustees are not to lose any benefit by the said agreement and bargain made between the Plaintiff and the said *Richard Dene* aforesaid, but shall be paid all their debts and charges due to them out of the lands conveyed unto them by the said deed of trust, made as aforesaid, and to that end the two next justices of the peace in the county where the land lieth which is to be conveyed to the Plaintiff as aforesaid, are to take the account of the said trustees, and to see what is due unto them from the said *Richard Dene*, or for what sum of money they or either of them stand engaged for as the proper debt of the said *Richard*, and to that end the said justices are to be armed with a commission for proof of all the debts wherein they are engaged and by the said deed are to be paid, which being ascertained, the Plaintiff shall pay unto them the money which he is to pay upon the said agreement for the purchase of the said premises towards the discharging of their said engagements; and thereupon it is likewise ordered and decreed that the said trustees, and the said *Roger Dene*, shall all join in perfecting the conveyances of the lands in question unto the Plaintiff, and the Plaintiff to hold and enjoy the same against the Defendants and all claiming under them since the said articles of agreement, and the overplus of the purchase money, if any shall remain, shall be paid by the said trustees to the said *Roger Dene*, the son, in such manner as by the said voluntary conveyance is settled.

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Feb. 28;
May 28.

Covenant running with the Land—Covenant not to use House as a Beer-shop—Constructive Notice—Yearly Tenant.

The owner of a freehold house had entered into a covenant with the Plaintiff, who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to the Defendant as tenant from year to year, without express notice of the covenant:—

Held (affirming the decision of *Wood*, V.-C.), that although the covenant might not at law run with the land, the Defendant was bound by it in equity.

The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant, as to the purchaser of a greater interest.

Per TURNER, L.J.:—A covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beer-shop, does not run with the land.

THIS was an appeal from an order on further consideration made by Vice-Chancellor *Wood* (1), under the following circumstances:—

By an indenture dated the 9th of December, 1859, the Plaintiffs, *Isaac Wilson*, *Joseph Whitewell Pease*, and *Alfred Kitching*, conveyed a piece of land, part of a building estate called the *Pindar Bank* Estate, in the town of *Darlington*, to *Robert Robinson* in fee. By the same indenture, *R. Robinson for himself, his heirs, executors and administrators*, covenanted with the Plaintiffs, their heirs and assigns, to repair the roads, and to erect buildings in the manner therein mentioned; and further, that no building or buildings erected or to be erected on the said purchased premises, or any part thereof, should be used for the sale of ale, beer, wine or spirits, or any other intoxicating liquor, nor for the purpose of carrying on any trade or business of a noxious character, or which should be deemed either a public or a private nuisance.

R. Robinson built a house on the piece of land purchased by him, which he subsequently sold to *Charles Marshall*, who conveyed it to the Defendant, *Jane Hart*, in fee.

In September, 1864, *Jane Hart* instructed Mr. *W. T. Robinson*, an auctioneer at *Darlington*, to let the house; and he accordingly

(1) Reported 2 H. & M. 551.

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let it to the Defendant, *John Thompson*, as tenant from year to year.

Thompson entered into possession on the 24th of November, 1864, and carried on the business of a grocer and provision dealer there, and as part of his business sold ale and beer, but not to be consumed on the premises.

In January, 1865, the Plaintiffs required *Thompson* to desist from selling ale and beer, and on his refusal, filed this bill on the 9th of February, 1865, against *Jane Hart* and *Thompson*, praying that they might be restrained from using the house for the sale of ale or beer, or any other intoxicating liquor.

It appeared by the evidence, that on several of the building estates in and near *Darlington* the tenants were restricted from selling beer; but this was not universally the case, and even on the *Pindar Bank* Estate there were two houses licensed to sell beer across the counter.

The Defendant, *Jane Hart*, admitted that she had notice of the covenant. The Defendant *Thompson*, stated in his answer that when he took the house he was a stranger in *Darlington*, and denied all knowledge that there was any such restriction imposed upon the use of the house which he took, or upon any other houses on the *Pindar Bank* Estate. He also stated—and the account was confirmed by *Thomas Littlefair*, one of his witnesses—that the Defendant and *Littlefair* went to the office of Mr. *W. T. Robinson* to inquire about the house, and that *Robinson* then asked the Defendant for what he wanted the shop, and that the Defendant answered that he wished to carry on the business of a provision dealer; and that *Robinson* then said that his orders were not to let it as a butcher's shop, but that he might carry on any other business there that he liked.

W. T. Robinson made an affidavit, in which he admitted that he had told *Thompson* that he was not to use the premises as a butcher's shop, but denied that he had said that he could carry on any other business in the house.

The cause was heard before the Vice-Chancellor on motion for decree, and his Honour made an order granting a perpetual injunction in terms of the prayer; but gave no costs against the Defendant *Thompson*.

From this decree *Thompson* appealed.

Mr. *G. M. Giffard*, Q.C., and Mr. *Fry*, for the Plaintiffs:—

The covenant runs with the land although the word "assigns" is omitted. The Court will look to the intended operation of the covenant rather than to the words: *The Prior's Case* (1).

But whether the covenant runs with the land or not at law, the Defendant had constructive notice of it and is bound in equity: *Tulk* v. *Moxhay* (2). Upon the Defendant's own admission he was informed that there was some restriction, and he was guilty of culpable negligence in not making further inquiries, when the facts must have been disclosed: *Parker* v. *Whyte* (3); *Taylor* v. *Baker* (4); *Robson* v. *Flight* (5).

Mr. *De Gex*, Q.C., for *Jane Hart*, took no part in the argument.

Mr. *Rolt*, Q.C., and Mr. *Kay*, for the Defendant *Thompson*:—

The covenant relates to the mode of using a building which was not *in esse* at the time of the execution of the conveyance, and the assigns are not expressly named. They are therefore not bound by the covenant: *Spencer's Case* (6); *Mayor of Congleton* v. *Pattison* (7).

The Defendant had no constructive notice. Notice is presumed in two classes of cases. First, when a person has notice that some incumbrance exists, he has constructive notice of the extent and particulars of such incumbrance. But here the Defendant had no reason to suspect the existence of any restriction to the use of the house as a beer shop; and if his evidence is correct, he was distinctly informed that there was none: *Jones* v. *Smith* (8). Secondly, where a person abstains from making inquiries which he ought to make, he is held to have notice of what would have been disclosed. But here there was no obligation on the Defendant to make inquiries. He was merely a tenant from year to year, and was not bound to inquire into the title of his landlord:

(1) Co. Litt. 385 *a*; cited 1 Sm. L. C. 50, 51, 4th ed.
(2) 2 Ph. 774.
(3) 1 H. & M. 167.
(4) 5 Price, 306.
(5) 13 W. R. 195.
(6) 1 Sm. L. C. 36, 4th ed.
(7) 10 East, 130.
(8) 1 Hare, 43; 1 Ph. 244.

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Hewitt v. *Loosemore* (1); *Ware* v. *Lord Egmont* (2); *Attorney-General* v. *Stephens* (3).

Mr. *Giffard*, in reply.

May 28. SIR G. J. TURNER, L.J., after stating the facts, continued:—

Three questions arise upon this appeal. First, whether the covenant contained in the deed of the 9th of December, 1859, ran with the lands so as to affect the Defendant *Thompson*, independently of any question whether he had notice of it or not. Secondly, whether assuming the covenant not to have run with the land, the Defendant *Thompson* ought to be held to be affected with notice of it; and, thirdly, whether, assuming the Defendant to be affected with notice of the covenant, it ought under the circumstances of the case to be enforced against him.

In the view which I have taken of this case it is not necessary for us to decide the first of these questions. The Vice-Chancellor, however, has been of opinion that the covenant did not run with the land, and it may be right for me to say that I see no reason for dissenting from that opinion. The covenant does not purport to bind assigns, and it seems to me to be a covenant directed not against the use of the land, but against the personal use and enjoyment of the building to be erected upon the land. The grantee, as I understand the covenant, was to be at liberty to erect any building which he might think proper upon the land, provided that the building, when erected, was not used for any of the purposes specified in the covenant. It was, as I think, a covenant applying merely to the personal use and enjoyment of the land by the grantee, and not to the permanent user of the land itself.

Then as to the second question, the notice of the covenant. The evidence certainly does not satisfy me that the existence of covenants of this description in respect of lands in the district was of such notoriety in the town of *Darlington*, as that the

(1) 9 Hare, 449. (2) 4 D. M. & G. 460. (3) 6 D. M. & G. 111.

Defendant ought, upon that ground, to be affected with notice of the covenant contained in the conveyance of this plot of land. If the Defendant is to be affected with such notice it must, I think, be upon the law of the case, and not upon the facts. It was argued for the Defendant that the circumstances which would affect a purchaser or mortgagee with notice, ought not to be held so to affect a mere tenant from year to year, that such a tenant ought not to be held bound to inquire into his landlord's title, and that even if in any case such a tenant was bound to make such inquiry, the Defendant was not bound to do so under the circumstances of this case, as he was, as it was said, induced by the representations of the landlord's agent to believe that no further inquiry was needed.

But these arguments cannot, I think, be maintained. Looking at them first with reference to their general application, on the one hand I am not by any means inclined to extend the doctrine of constructive notice; but, on the other hand, I am as little inclined to fritter away the principles of the Court by refusing to apply them to cases to which they properly extend.

It cannot, I think, be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year. The difference in the cases seems to me to be only in the quantum of injury which falls upon the party to whom the rule is applied. Then looking at these arguments with reference to the circumstances of this case, I do not think that the mere fact of the landlord's agent having represented that his orders were not to let the house for a butcher's shop, was sufficient to absolve the Defendant from making further inquiry as to the purposes for which it might be used. As to the other representation alleged to have been made by the landlord's agent, it is, I think, more proper to consider it with reference to the

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third point. Upon the point now before us I may add that assuming notice of the covenant, the case of *Tulk* v. *Moxhay* (1) seems to me to apply.

Then, as to the third point. It is alleged, on the part of the Defendant, that the landlord's agent represented that the house might be used for any other purpose than as a butcher's shop, and certainly, if this representation was made, I am not disposed to think that this Court ought to enforce the covenant against the Defendant, whatever right there may be upon it at law. The evidence, however, does not satisfy me that any such representation was made.

[His Lordship then considered the evidence which had been adduced upon this question, and expressed his opinion that the Defendant's case failed on this point also. He then continued as follows :—]

9 Ch D 261

In dealing with the case I have assumed that the conveyances to *Marshall* and *Hart* did not disclose this covenant; but it may be right to say that I have not seen those conveyances. I have not thought it necessary to do so, as it is obvious that the investigation of title which, in my opinion, the Appellant was bound to make, must have disclosed the covenant. I may mention that some doubt at one time occurred to me whether the case might not be distinguished upon the ground that this was a personal covenant merely, and that persons dealing with estates, although they might be bound to inquire into matters affecting the estate, might not be bound to inquire into mere personal obligations affecting the owner in respect of the estate; but upon consideration I have thought that this distinction is more plausible than sound, and that it certainly cannot apply to the present case, as there was here no inquiry into the title, and the inquiry, if made, must have resulted in notice of the covenant. I think this appeal must be dismissed; but certainly without costs.

SIR J. L. KNIGHT BRUCE, L.J. :—

I agree in the conclusion of my learned brother. But as to the

(1) 2 Ph. 774.

first of the three questions, I wish pointedly to say that I abstain from giving an opinion. My conclusion is the same whatever answer ought to be given to that question.

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Solicitor for the Plaintiffs: Mr. *Jarvis*.

Solicitors for the Defendant *Thompson*: Messrs. *Cunliffe & Beaumont*.

Ex parte HARRIS. *In re* ASH.

L. JJ. 1866 *June* 2.

Bankruptcy—Bankrupt Law Consolidation Act, 1849, *s.* 101—*Bankruptcy Act*, 1861, *s.* 96.

The 101st section of the *Bankrupt Law Consolidation Act*, 1849, is not repealed by the 96th section of the *Bankruptcy Act*, 1861.

THIS was an appeal from an order of Mr. Commissioner *Sanders* declining to adjudicate *Richard Ash* a bankrupt.

On the 8th of March, 1866, a Petition for adjudication of bankruptcy against *Richard Ash* was filed on behalf of *John Espley*. The act of bankruptcy relied on, was the execution by *Ash* of a deed dated the 28th of November, 1865, by which he assigned all his estate and effects to *John Espley* and *Richard Espley*, in trust for his creditors. The deed had been executed by *John Espley*, both as a trustee and as a creditor. The learned Commissioner, on the same 8th of March, refused the application for adjudication, on the ground that *John Espley*, having assented to the deed, could not treat it as an act of bankruptcy.

On the 22nd of March, without any fresh Petition being filed, *John Harris*, a creditor who had not assented to the deed, applied for an adjudication of bankruptcy against *Ash*, under the 101st section of the *Bankrupt Law Consolidation Act*, 1849. The learned Commissioner refused the application, holding that the 96th section of the *Bankruptcy Act*, 1861, made a new Petition necessary.

Mr. *Harris* appealed.

Mr. *De Gex*, Q.C., and Mr. *Bardswell*, for the Appellant:—

Under the 101st section of the Act of 1849, no new Petition was necessary, but the learned Commissioner thought that this

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section was impliedly repealed by the 96th section of the Act of 1861. The two sections are, however, in no way conflicting, and as the 101st section is not included among the clauses which are expressly repealed by the Act of 1861, there can be no doubt that the two clauses were intended to stand together; such a distinct and important section as the 101st would have been repealed expressly, if repeal had been intended. It is true that in general there would be no advantage in proceeding under the 96th clause of the later Act rather than under the 101st clause of the earlier, but there are cases in which there would. Thus the first Petition might be one by the bankrupt himself, an adjudication on which would not relate back, for which reason applications often were made to annul an adjudication made on the bankrupt's application, in order to substitute one made on the application of a creditor. Again, the first Petition might be founded on a bad act of bankruptcy, yet, but for the 96th section, no other Petition could be filed until the first was disposed of. The insertion of this section is therefore fully accounted for, without supposing it intended to be in substitution for the 101st section of the earlier Act. *Ex parte Cheese* (1); *Ex parte Goodall* (2); are against implying a repeal in such a case.

SIR J. L. KNIGHT BRUCE, L. J.:—

With great deference and respect to the knowledge and experience of the learned Commissioner, I do not take the same view of these enactments as he has done. I think that it was competent to him to proceed to adjudication. I think that public convenience and correct construction go together in supporting the view that a fresh Petition was not necessary.

SIR G. J. TURNER, L.J.:—

The Act of 1861 contains a clause expressly repealing various sections of the Act of 1849; but the 101st section is not among the sections there enumerated. *Primâ facie*, therefore, it is to be supposed that the Legislature did not intend to repeal it. The 96th section of the later Act is not inconsistent with the 101st

(1) 3 M. D. & D. 79. (2) 1 De G. 580.

section of the former Act, and may in some cases have a beneficial operation, even if that section remains in force. I think therefore that there is no reason for considering the one clause to have been repealed by the other, and that the learned Commissioner might have proceeded to adjudication without a new Petition.

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Solicitors :—Messrs. *Chilton, Burton, Yeates, & Hart.*

PLATT *v.* WALTER.

L. JJ. 1866 *June* 7.

Practice—Re-transfer of Cause.

Where a cause has by General Order been transferred from one Court to another, a re-transfer will not, without consent, be ordered where it will delay the hearing. Where it will not be delayed, the Court will give weight to the fact that the Judge from whose Court it has been transferred has, by means of interlocutory applications, gained an acquaintance with the facts.

THE bill in this cause was filed by two of the proprietors of the *Evening Mail* newspaper against the other proprietors of that newspaper and the proprietors of the *Times*, to have the rights and interests of the proprietors of the *Evening Mail* in and over the *Times* and its establishment ascertained by the Court.

On the 20th of January, 1866, after a full argument, Vice-Chancellor *Wood* granted an injunction until the hearing or further order, restraining the Defendant *Walter*, as manager of the two newspapers, from discontinuing, or impeding the editing, printing, and publishing of the *Evening Mail* in such manner and in such connection with the editing, printing, and publishing of the *Times* as theretofore. His Honour, in giving judgment, expressed a strong opinion that one principal right claimed on behalf of the *Evening Mail*, that of republishing in that paper the articles which had appeared in the *Times* of the two preceding days, could not be effectually disputed at the hearing.

The cause stood No. 131 for hearing in Vice-Chancellor *Wood's* list of causes for Trinity Term. On the 23rd of May a General Order was made for the transfer of a great number of causes from the Court of Vice-Chancellor *Wood* to that of Vice-Chancellor

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Stuart; and this cause was included in the transfer. The Plaintiffs, by special leave, now moved to have it re-transferred to the Court of Vice-Chancellor *Wood.* It appeared from the state of the cause lists in the two Courts, that the hearing was likely to take place much sooner if the cause was left in the paper of Vice-Chancellor *Stuart* than if it was re-transferred.

Mr. *Bagshawe,* for the motion:—

The whole matter has been before Vice-Chancellor *Wood,* on the motion for an injunction; and it is desirable that the cause should be heard before a Judge who has already acquired full knowledge of it, the materials at the hearing being almost identical with those on the motion. The Vice-Chancellor *Wood* has expressed an opinion on the chief point in the case, and it is undesirable that any other Judge except an appellate one should entertain a case which has already been virtually decided.

Sir *H. M. Cairns,* Q.C., and Mr. *Haddan, contrà*:—

It is important to us to get the question decided at once, whereas the Plaintiffs lose nothing by delay. The cause will be heard much sooner where it is, and ought not to be re-transferred merely because the Plaintiffs prefer to have it in the Court of a Judge who has already intimated an opinion in their favour.

Mr. *Plummer,* and Mr. *Boys,* appeared for other Defendants in opposition to the application.

Mr. *Bagshawe,* in reply.

Sir J. L. Knight Bruce, L.J.:—

In this case the Plaintiffs are in possession of an interlocutory injunction granted by one of the learned Vice-Chancellors. From that interlocutory injunction, the Defendant *Walter* is desirous, if he can, of freeing himself as soon as he can. There appears to be great probability that if the Court shall not interfere on the present occasion, the cause will come on for hearing much sooner than if the Court shall so interfere. The cause now stands for hearing before Vice-Chancellor *Stuart;* and it appears highly

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probable that if it remains there it will be heard before the long vacation. My opinion is, without reference to the personality, if I may use the expression, of the learned Judge who granted the injunction, the cause ought to remain where it will be soonest heard.

SIR G. J. TURNER, L.J. :—

I am of the same opinion. I think that the practice of the Court in this respect has varied, and that now the question to be considered is, whether, by means of the transfer, the Court from which the transfer has been made is so far relieved that there is a reasonable prospect of the cause being heard as soon in one Court as in the other. If that be so, the Court will give weight to the circumstance that the Judge from whom the cause has been transferred, has gained such an acquaintance with it as would expedite the further proceedings. According to my recollection of the practice many years ago, the Lord Chancellor was uniformly in the habit of refusing a re-transfer if it would delay the hearing of the cause.

Solicitor for the Plaintiff: Mr. *Irwin.*
Solicitor for the Defendants: Mr. *Alexander Dobie.*

HARRISON *v.* RICHARDS.

L. JJ.
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June 7.

Practice—Conduct of Proceedings—Executor.

A decree having been made for the administration of personal estate at the suit of the residuary legatees, it was found necessary that proceedings should be taken in equity against a person who had had dealings with the testatrix. The executor was willing to conduct them, and no case of misconduct was established against him. An order of *Stuart*, V.C., giving the Plaintiffs liberty to take proceedings in the name of the executor was discharged on appeal, and the executor directed to take them.

THE bill in this case was filed on behalf of five infants for the administration of the real and personal estate of *Elizabeth Harrison*, to which they were beneficially entitled under her will. The bill

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was of the simplest description, only asking for the common accounts. The Defendant *Richards,* the only acting executor, just before the time for filing a voluntary answer had expired, took out a summons for further time, which was refused. On the 8th of July, 1865, the common decree was made by consent.

Under this decree a Mr. *French* carried in a claim as a creditor. It appeared that there had been various transactions between the testatrix and *French,* and that certain agreements had been entered into between them, and certain assignments made by the testatrix to *French,* which were considered impeachable, and which it was for the interest of the estate to set aside. The executor investigated the circumstances relating to these transactions, and communicated the result of his inquiries to the Plaintiffs' solicitors. The Plaintiffs, by their next friend, subsequently took out a summons for leave to institute proceedings in the name of *Richards,* the executor, for the purpose of setting aside the agreements and assignments. *Richards* objected to this, and submitted by his affidavit that if proceedings were directed they ought to be conducted by him. He explained by his affidavit that he had wished to put in a voluntary answer, not for the purpose of throwing any obstacle in the way of the suit, but for the purpose of giving information as to the state of the testatrix's affairs, in order that, if desirable, special inquiries might be directed as to matters in which there was a difficulty as to the proper course to be taken. The summons was adjourned into Court, and Vice-Chancellor *Stuart,* after observing upon the application to file a voluntary answer as improper, and giving an unfavourable impression of the executor's mode of discharging his duty, made an order giving the Plaintiffs leave to institute such suit as counsel might advise for the purpose of setting aside the agreements and assignments, and giving them liberty to use the name of *Richards* as Plaintiff in the suit, and directing that he should be indemnified out of the residuary personal estate of the testatrix against the costs. His Honour refused to give the executor any costs of the application. The executor appealed.

Mr. *Bacon,* Q.C., Mr. *Craig,* Q.C., and Mr. *C. A. Beavan,* for the Appellant.

Mr. *Malins*, Q.C., and Mr. *J. Napier Higgins*, for the Plaintiffs, in support of the order.

SIR J. L. KNIGHT BRUCE, L.J.:—

In my opinion this case so far involves a question of principle, that we ought not to decline to interfere with the discretion exercised by the Vice-Chancellor. I do not consider, by analogy to other cases, that enough has been shewn to make it right to take the conduct of the proposed suit out of the hands of the executor.

SIR G. J. TURNER, L.J.:—

The order under appeal, whatever be its form, is in substance an order for a receiver, for it takes the administration of a part of the estate out of the hands of the executor and intrusts it to some one else. Now, a receiver is not appointed against an executor unless some case of misconduct is proved. Is there any such case made out here? It is alleged against him that he applied for time to put in a voluntary answer; but it seems to me that it would have been very convenient for a voluntary answer to have been put in, since the Court would then have had materials before it enabling it to give special directions as to the dealings with Mr. *French*, which have become the subject of subsequent inquiry. The proceedings to be taken must be carried on in the name of the executor; and I find that all the information which lays a ground for those proceedings has been obtained from him or his solicitor. If the proceedings are taken out of their hands, it is not likely that the executor will voluntarily communicate with the other solicitor for the purpose of giving all the information material to the carrying on the proceedings. In the absence of misconduct on the part of the executor, I do not think it desirable to place the business in the hands of a person with whom he is not likely to communicate freely. If it had been the rule of the Court, as Mr. *Malins* contended, that the conduct of proceedings of this description should, as a matter of course, be given to the persons beneficially interested in the estate, I should have been one of the last persons to disturb it. If an executor refuses to

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take proceedings which ought to be taken, the Court will give the Plaintiff power to take them in his name; but where there is no case of misconduct made out against the executor, and he is willing to conduct the proceedings, I never heard of such a rule as that it was of course to take them out of his hands and give the Plaintiff leave to proceed in his name. Mr. *Leach*, the Registrar, confirms my view of the course of the Court in this respect. I am of opinion, therefore, that the order of the Vice-Chancellor should be discharged, and that the executor should be directed to take proceedings for setting aside the agreements and assignments.

Solicitors for the Plaintiffs: Messrs. *Burgoynes, Milnes, & Burgoyne.*

Solicitors for the Executor: Messrs. *Terrell & Chamberlain.*

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1866.
June 2, 8.

Ex parte SAMPSON. *In re* COBHAM.

Bankruptcy—Debtor petitioning against himself—Statement of Debts—Bankruptcy Act, 1861, *s.* 93.

2 Ch 365.
10 Eq 58, 60

A debtor was adjudged bankrupt on his own Petition, and on the 22nd of January filed his statement under the *Bankruptcy Act*, 1861, *s.* 93. On the 6th of February assignees were chosen, who proceeded to get in the estate. On the 21st of February, a creditor who had proved her debt at the meeting of the 6th, gave notice of motion for the 5th of March, to annul the adjudication and dismiss the Petition, on the ground that the statement was inaccurate, inasmuch as the bankrupt had omitted from it the names of some fully secured creditors. On the 5th of March the Commissioner adjourned the application, giving the bankrupt leave in the mean time to file an amended statement, which he filed on the 17th of March. On the 11th of April the application was finally heard, when the Commissioner made an order annulling the adjudication, and dismissing the bankrupt's Petition, from which order the assignees appealed:—

Held, by *Knight Bruce*, L.J., that whatever right the respondent might have had to set aside the adjudication if she had proceeded with more diligence, she had, by her course of conduct, debarred herself from any such right:

Held, by *Turner*, L.J., that the Act and General Orders indicated so obscurely the necessity of entering fully secured debts in the statement,

that no fraud could be imputed to the bankrupt on account of his omitting them; and that there was no sufficient reason for annulling the adjudication, the Court having power to decide that the special circumstances of any particular case took it out of the General Orders.

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IN this case *G. F. Cobham*, on the 18th of January, 1866, filed a Petition for adjudication against himself, on which he was adjudicated bankrupt.

On the 22nd of January, in compliance with the *Bankruptcy Act*, 1861, sect 93, he filed a statement of his debts and liabilities, the names and addresses of his creditors, and the causes of his inability to meet his engagements.

On the 6th of February, creditors' assignees were chosen.

On the 21st of February, Mrs. *Macdonnell*, a creditor who had filed a proof of her debt on the 6th, gave notice for the 5th of March, of an application to dismiss the Petition and annul the adjudication, on the ground that the statement which had been filed by the bankrupt was insufficient and incorrect.

The errors alleged were as follows:—

(1). A debt of £600, due from the bankrupt to a Mr. *Charles Pearson*, on a sufficient mortgage security, was omitted. Mr. *Pearson* was entered as a creditor only in respect of another sum of £273, which was insufficiently secured, the security being set forth in the statement as being of the estimated value of £100. (2). A debt of £100, due to Mr. *Tufnell Southgate*, on the security of a bill of sale of furniture, was omitted. (3). Mrs. *Macdonnell* herself was entered in the statement as a creditor without any amount being given, and opposite to her name was an entry that she held a mortgage on a piece of land called the *Goss*, at *Greenhithe*, which was alleged to be incorrect.

The security to Mr. *Southgate* was a bill of sale given on the 17th of January, the day before the adjudication. As regarded the claim of Mrs. *Macdonnell*, it was a claim for arrears of rent, for which an action was pending at the time of the adjudication. There was a conflict of evidence as to the statement that she held a mortgage covering this debt, there being a mortgage, the circumstances as to which did not clearly appear.

The bankrupt, in opposition to the application, filed an affidavit, deposing that he had made his statement *bonâ fide*, and without

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any intention to mislead—that he had not looked upon Mr. *Pearson* as a creditor for the £600, since it was amply secured—that as the bankrupt was informed and believed, Mr. *Southgate* made no claim against his estate in respect of the debt for which the bill of sale was given, and that he fully believed Mrs. *Macdonnell* to be amply secured.

On the 5th of March the application came on to be heard, and the learned Commissioner made an order adjourning the hearing to the 26th, with liberty to the bankrupt to amend his statement, and with liberty for either party to adduce further evidence.

On the 17th of March the bankrupt filed an amended statement, in which he entered Mr. *Pearson* as a creditor for £354 16*s.* 6*d.* for which he held a security estimated at £120, and as a fully secured creditor for £600. He entered Mr. *Southgate* as a creditor for £104 17*s.* 9*d.*, holding for it a bill of sale of the bankrupt's furniture, of the value of £78; and he entered Mrs. *Macdonnell* as claiming to be a creditor for £307 7*s.* 7*d.*, and as holding a mortgage on property of more than sufficient value to cover her mortgage debt of £500 and the £307 7*s.* 7*d.*

On the 26th of March the hearing of the application was again adjourned till the 9th of April, on which day it was further adjourned till the 11th, and on that day the learned Commissioner made an order dismissing the Petition.

The assignees had ever since their appointment been proceeding to get in the bankrupt's estate, and his landed property was sold by auction on the 11th of April, the day on which the Petition was dismissed.

The assignees now appealed against the order of dismissal.

Mr. *Bacon*, Q.C., and Mr. *Reed*, for the appellants:—

It never can have been the intention of the Legislature that the rights of the creditors should be interfered with in this way, and assignees and persons dealing with them be placed in such an embarrassing position after a lapse of many weeks, because the bankrupt has been guilty of some slight negligence in preparing his statement. The bankrupt prepared it here in a way which we admit to be inaccurate, but which was quite natural, looking at the principle enunciated in sect. 97 of the Act, which is repeated in the schedule

to the General Orders (1). The Act says nothing about the dismissal of the Petition for non-compliance with the 93rd section; the Orders do, but they do not say that it is to be dismissed for any trifling inaccuracy. The fair construction is, that there is to be a dis-

(1) General Orders, October 12, 1861 :—

4. "The statement required to be filed in Court under section 93 of the *Bankruptcy Act*, 1861, by every debtor petitioning for adjudication of bankruptcy against himself, and verified by the oath of the Petitioner, shall be so filed and verified by such debtor within three days after filing his Petition, or within such further time as the Commissioner may under special circumstances allow, and shall be in the form specified in the schedule to these Orders annexed, and if such statement be not so filed and verified, the said Petition shall be dismissed."

The schedule above referred to is as follows :—

"N.B. This is to be a full, true, and accurate statement verified by the oath of the petitioner, of his debts and liabilities of every kind, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements, reckoning as debts :—

"1. Sums due to creditors holding mortgages, or other available securities or liens, after deducting the value of the properties comprised in such mortgages, securities, or liens.

"2. Such interest and costs as shall be due in respect of any of the debts.

"But not reckoning—

"1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency protection or bankruptcy.

"2. Debts barred by any *Statute of Limitations*.

The statement must be filed and verified within three days after filing the Petition for adjudication, and in default thereof the Petition will be dismissed.

"A full, true, and accurate statement, verified by the oath of the Petitioner, of the debts and liabilities of every kind, reckoned in manner above directed, of —— of ——, a debtor petitioning for adjudication of bankruptcy against himself, and of the names and residences of his creditors, and of the causes of his inability to meet his engagements.

Creditors.		Amount of Debts after deducting the value of property comprised in mortgages, securities, or liens.	Debts secured by mortgages, or other available securities or liens, showing the amount secured, and the value or estimated value of the property comprised therein.	Causes of the Petitioner's inability to meet his engagements.
Names.	Residences.			

"To be signed by the Petitioner."

L. JJ. 1866 *Ex parte* SAMPSON. *In re* COBHAM.

missal if the requisitions of the 93rd section are not substantially complied with, but not otherwise. The Commissioner here gave leave to amend, and an amended statement was filed, the accuracy of which is not disputed, and after this, we submit that there could not be a dismissal; we say, moreover, that apart from this, the objecting creditor has not come in time; an objection of this nature ought to be taken at once. It will be impossible ever to find persons to be assignees when a man is adjudged bankrupt on his own Petition, if their title is liable to be defeated, after they have got in the estate, on the ground of some inaccuracy in a statement, the truth of which they have no means of testing.

Mr. *De Gex*, Q.C., and Mr. *Nalder*, for Mrs. *Macdonnell*:—

The learned Commissioner came to the conclusion that the statement was importantly and wilfully inaccurate, and this we submit was a true conclusion. The wilful omission of the name of a creditor is fatal: *Re Moore* (1); and the matter is not one where an amendment can be allowed under the 30th rule of the General Orders: *Re Tyrie* (2), a case very similar to the present. It is most important that the bankrupt should give accurate information in his statement, otherwise all manner of fraudulent dealings might remain concealed. A full and accurate disclosure, such as is required by the Act must be considered a condition precedent to the adjudication.

Mr. *Reed*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

If the present respondent had proceeded with more diligence and consistency there might have been some reason for holding that this adjudication ought to be set aside on her application. But her proceedings have been such, and she has so acted, as to preclude her from asserting any title she might otherwise have had to insist on the dismissal of the Petition. With deference differing from the conclusion of the learned Commissioner, I am of opinion that this bankruptcy should stand.

(1) 5 L. T. (N.S.) 806, Holroyd, Com.
(2) 13 W. R. 953, Holroyd, Com.

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SIR G. J. TURNER, L.J.:—

I agree. The question does not turn on the Statute, which says nothing as to dismissal, but on the General Orders. Now, it is within the power of a Judge to say that the special circumstances of any particular case take it out of any General Orders of the Court. I should have been unwilling to interfere with the decision of the Commissioner, if I had seen any reason to suspect fraud on the part of the bankrupt. But it appears to me that there was a serious question, how he ought to frame his statement. The 93rd section is expressed in very general terms, not furnishing any rule as to secured debts. We come then to the Orders, the 4th rule of which provides that the statement shall be in the form specified in the schedule. That form sets out the 97th section of the Act, the first provision of which is, that sums due to creditors holding securities are to be reckoned as debts after deducting the value of the securities. *Primâ facie*, therefore, where the value of the property in the security exceeds the amount of the debt, the debt ought not to be included in the list. The tabular form, at the end of the schedule, appears to set this right, but it does so very obscurely, if at all. I cannot, therefore, see any ground for imputing fraud to the bankrupt because he omitted fully secured debts from his statement. Then if there be no fraud, on what ground can the Court interfere to set aside the adjudication. What good can any creditor get? Of what use would it be to the creditors to be informed by the statement that there were certain creditors fully secured? If any of their securities were made fraudulently, the proper remedy, as it appears to me, is for the assignees to take proceedings to set them aside, but I do not think annulling the adjudication a proper remedy. It seems to me therefore, that apart from the effect of the leave given to amend the statement, as to which I give no opinion, there is no sufficient ground for dismissing this Petition.

Solicitors for the Appellants: Messrs. *Harrison & Lewis.*
Solicitors for the Respondent: Messrs. *Steele & Sons.*

L. JJ.
1866
June 12.

COLYER *v.* COLYER.

Practice—Revivor—Supplement.

Where a sole Plaintiff dies, the suit may be revived after decree without bill filed.

THIS was a redemption suit, in which a decree had been made, since which time the sole Plaintiff, the mortgagor, was dead.

Mr. *Marten*, on behalf of the devisees in trust under the will of the mortgagor and some of the parties interested, now asked for an order to revive against the mortgagee and the other parties interested under the will, and said that the application was first made to Vice-Chancellor *Kindersley*, who wished it to be brought before the Lords Justices. The difficulty arose under section 52 of 15 & 16 Vict. c. 86, which enacted, that it should not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive, and substituted the order to revive upon an allegation. But it had been doubted whether this section applied to the case of a sole Plaintiff dying, as the suit could not then have been continued by a bill of revivor, or its defects supplied by a supplemental bill; but an original bill in the nature of a supplemental bill would have been required; *Mitford*, Pleading (1). There had been a difference in the practice. Orders to revive had been made after the death of a sole Plaintiff or Defendant in *Jackson* v. *Ward* (2); *Gilbert* v. *Tomlinson* (3); *Eyre* v. *Brett* (4); and had been refused in *Dendy* v. *Dendy* (5); *Williams* v. *Williams* (6); *Laurie* v. *Crush* (7); *Townend* v. *Toker* (8); *Morgan's* Chancery Acts and Orders (9).

SIR G. J. TURNER, L.J., after consulting with LORD JUSTICE KNIGHT BRUCE:—

With all due deference to the majority of the learned Judges,

(1) P. 86, Ed. 5.
(2) 1 Giff. 30.
(3) 8 W. R. 467; 6 Jur. (N.S.) 532.
(4) 13 W. R. 763.
(5) 5 W. R. 221.
(6) 9 W. R. 296.
(7) 32 Beav. 117.
(8) 14 W. R. 300.
(9) 3rd ed. p. 210.

we think you ought to have the usual supplemental order, and the parties may move to discharge it, and the only thing will be that you may then have to file a supplemental bill.

L. JJ. 1866 COLYER v. COLYER.

Solicitors: Messrs. *Davidson, Carr, & Bannister.*

RHODES *v.* RHODES.

L. JJ. 1866 *June* 12.

Practice—Appeal—Certificate.

Where the Vice-Chancellor had rejected evidence on an inquiry in Chambers adjourned into Court, and the party producing the evidence appealed, the Lords Justices doubted whether there could be such an appeal, and whether he ought not to wait for the certificate and then move to vary; and they directed the application to stand over and to come on with any motion to vary the certificate.

THIS was a creditors' suit for the administration of the estate of *Thomas Rhodes,* in which certain inquiries had been directed and were prosecuted in Chambers. At these inquiries the Plaintiff tendered as evidence certain affidavits which had been made in another suit, and the Defendants objecting to this evidence being received, the matter was adjourned into Court, where, on the 17th of March last, the Vice-Chancellor *Wood* rejected the evidence, and ordered the Plaintiff to pay the costs of the adjournment into Court. The Plaintiff now moved, by way of appeal, that he might, notwithstanding the refusal of the Vice-Chancellor *Wood,* be at liberty to read as evidence the documents in question, and that so much of the order as directed the payment of costs might be discharged.

Mr. *Freeling,* and Mr. *Kingdon* (Mr. *Rolt,* Q.C., with them), in support of the motion.

Mr. *Willcock,* Q.C., and Mr. *Roupell,* for some of the Defendants.

Mr. *G. M. Giffard,* Q.C., and Mr. *Druce,* for other Defendants, objected that there could be no appeal in a matter like this. The

L. JJ. 1866 RHODES v. RHODES.

proper course to have taken would be to wait until the certificate was made, and then move to vary it on account of the improper rejection of evidence; that was always the practice as to findings by the Master. Perhaps the certificate would be in the Plaintiff's favour, and then there would be no appeal. We ought to know what is the practice at law as mentioned in section 28 of 15 & 16 Vict. c. 80. If an appeal could be brought, and perhaps carried to the House of Lords at every step, the proceedings would never end.

Mr. *W. M. James*, Q.C. (*amicus curiæ*), referred to sections 33 and 34, of 15 & 16 Vict. c. 80, and said that the intention of the Chancery Commissioners was that the parties might be able to take the opinion of the Court on any point which arose, and should not be compelled to wait for the certificate.

The LORDS JUSTICES said that there was considerable difficulty in the matter, and they thought that, with a view to an appeal, there ought to be a regular order rejecting the evidence. According to the old practice before the Master, there could be no such application; and they thought the best plan would be to discharge the order of the Vice-Chancellor without prejudice to any question, and to let this application stand over, and come on with any motion which might be made to vary the certificate.

Solicitors for the Plaintiff: Messrs. *Bridges, Sawtell, Heywood, & Ram.*

Solicitors for the Defendant: Messrs. *Hughes, Masterman, & Hughes.*

In re TEMPEST.

L. JJ.
1866
May 25, 28;
June 1, 12.

Trustee Acts—Principles of the Court in selecting new Trustees—Evidence.

The discretion which the Court exercises in appointing new trustees is not a mere arbitrary discretion, but is to be exercised in accordance with certain principles. Among them are the following :—

First—In selecting a person for the office, the Court will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from, the instrument creating it.

Secondly—The Court will not appoint a person with a view to the interest of some of the *cestuis que trusts*, in opposition to the interest of others.

Thirdly—The Court will have regard to the question whether the appointment will promote or impede the execution of the trust. But

Semble, the mere fact of the continuing trustee refusing to act with the proposed new trustee, would not be sufficient to induce the Court to refrain from appointing him.

Where the question of the appointment of a new trustee has been brought before the Court of appeal for rehearing, the Court, in considering the fitness of the new trustee, is not precluded from regarding evidence of occurrences subsequent to the original hearing.

THIS was a Petition under the *Trustee Act*, 1850, for the appointment of a new trustee of the real estates devised by the will of the late Sir *C. R. Tempest*, Bart.

The testator by his will, dated the 25th March, 1863, devised his real estates to the Hon. *T. E. Stonor* and Mr. *J. Fleming*, upon certain trusts, under which the Petitioner *H. A. J. Tempest*, the eldest son of the testator's nephew, *Charles Henry Tempest*, would eventually become tenant in tail in possession. The testator also made a codicil, of the same date as his will, whereby he gave certain personal property to Mr. *Stonor*, Mr. *Fleming*, and Lord *Camoys*, upon certain charitable trusts.

The testator died in November, 1865. Mr. *Stonor* died in the testator's lifetime, and under the terms of a power contained in the will, Mr. *Fleming* and Mr. *Arthur Cecil Tempest*, an uncle of the Petitioner, being the persons entitled under the will to the enjoyment of the surplus rents and profits of the real estates, were the persons in whom the right of appointing a new trustee was vested. They could not, however, agree in the choice of a trustee,

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and accordingly this Petition was presented in the name of *H. A. J. Tempest*, who was an infant, praying for the appointment of the Hon. *Edward Petre* as a trustee in the place of Mr. *Stonor*. Most of the persons beneficially interested concurred in this proposal, but Mr. *Fleming* opposed it, not from any personal objection to Mr. *Petre*, but because he was connected with and proposed by a branch of the family with which the testator was not on friendly terms, and which he had excluded from participation in the management of his property. No question arose as to the appointment of a new trustee under the codicil, the two surviving trustees having agreed in the choice of a successor to Mr. *Stonor*.

The Master of the Rolls, by whom the Petition was heard, granted the prayer of the Petition, and appointed Mr. *Petre;* but inasmuch as the power of appointing new trustees contained in the will sanctioned an increase in the number of trustees, he joined Lord *Camoys* as a third trustee, hoping to satisfy both parties. Mr. *Fleming*, however, appealed from this order.

After the order was made, some further affidavits were made in explanation of the reasons which induced Mr. *Fleming* to object to the appointment of Mr. *Petre*.

Mr. *Rolt*, Q.C., and Mr. *Kay*, for the Appellants.

Mr. *Baggallay*, Q.C., and Mr. *Cotton*, for Lord *Camoys*.

Mr. *Selwyn*, Q.C., and Mr. *Rigby*, for the Petitioner.

Mr. *Cole*, Q.C., and Mr. *Little*, for Mr. *A. C. Tempest*.

June 12. SIR G. J. TURNER, L.J.:—

There are two questions raised by this appeal. First, whether the order of the Master of the Rolls ought to be reversed in so far as it appoints Mr. *Petre* to be a trustee of the testator's will; and secondly, whether assuming that the order ought to be reversed in this respect, Lord *Camoys* ought to be appointed the trustee. The first of these questions has not seemed to me to be altogether free from difficulty, and in my view of this case it is by no means

an unimportant question. It involves, as I think, to no inconsiderable extent the principles on which this Court ought to act in the appointment of new trustees.

It was said in argument, and has been frequently said, that in making such appointments the Court acts upon and exercises its discretion; and this, no doubt, is generally true; but the discretion which the Court has and exercises in making such appointments, is not, as I conceive, a mere arbitrary discretion, but a discretion in the exercise of which the Court is, and ought to be, guided by some general rules and principles, and, in my opinion, the difficulty which the Court has to encounter in these cases lies not so much in ascertaining the rules and principles by which it ought to be guided, as in applying those rules and principles to the varying circumstances of each particular case. The following rules and principles may, I think, safely be laid down as applying to all cases of appointments by the Court of new trustees.

First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this description any distinction can be drawn between express declarations and demonstrated intention. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.

Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuis que trusts*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is

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in duty bound to look to the interests of all, and not of any particular member or class of members of his *cestuis que trusts.*

A third rule which, I think, may safely be laid down, is,—that the Court in appointing a trustee will have regard to the question, whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution.

These are the principles by which, in my judgment, we ought to be guided in determining whether Mr. *Petre* ought to be appointed to be a trustee of this will, and, in my opinion, there are substantial objections to his appointment on each of the three grounds to which I have referred. There is not, of course, and cannot be, any possible objection to Mr. *Petre* in point of character, position, or ability, and I desire most anxiously to be understood as not intending, in disapproving his appointment, to cast the slightest possible reflection upon him. I have not for one moment doubted that he is a gentleman of most unexceptionable character, and well qualified in every respect to fill the office of trustee ; but I think that the principles to which I have referred are opposed to his appointment.

First, as to the wishes of this testator, it is impossible, I think, to read this will without being fully satisfied that the great object and purpose of the testator was to exclude Mr. *Charles Henry Tempest* not only from all interest in, but from all connection with his estate. A more complete exclusion of him, both from any interest in and from any power over the estate, could not, as it seems to me, have been devised. Is it then consistent with this purpose of the testator that a trustee should be appointed who, upon the evidence before us, I cannot doubt is the nominee of Mr. *Charles Henry Tempest,* and is proposed for the purpose of carrying into effect his wishes and intentions ? The facts, I think, prove that this is the position of Mr. *Petre.* He is proposed by Mr. *Washington Hibbert,* the father-in-law of Mr. *C. H. Tempest,* and the very person the connection with whom led to the making of this will, by which he was excluded. He is supported, and I desire not to be understood as saying, in any other than a legal sense, improperly, by Mr. *A. C. Tempest* his brother, who it appears upon the evidence declined to attend the testator's funeral on account of the

dispositions of the will; and one of the principal witnesses in support of his appointment, and the person most active in these proceedings is Mr. *Broadbent*, the solicitor of Sir *C. H. Tempest*, under whose advice we find that Mr. *Petre* adopted that most unfortunate and, I must say, ill-advised step of declining to meet his co-trustees. Looking to all these circumstances, and to the whole of the evidence before us, I have as little doubt as to what led to the proposal of Mr. *Petre* as I have as to the intentions of this testator, and upon this ground, therefore, I think that Mr. *Petre* ought not to be appointed to be a trustee of this will.

It was said for the respondents, that the testator's dispositions were captious and absurd, and ought not therefore to be regarded, but much as we may regret that such dispositions were made, we cannot disregard them.

Then, as to the second ground, the objection to the appointment of Mr. *Petre* seems to me to be still more decisive. The evidence, in my opinion, very plainly shews that Mr. *Petre* has been proposed as trustee, and has accepted that office, with a view to his acting in the trust in the interests of some only of the objects of it, and in opposition to the wishes of the testator, and not with a view to his acting as an independent trustee for the benefit of all the objects of the trusts, and I do not hesitate to say that, in my opinion, this fact is alone sufficient to prevent us from confirming his appointment. It was objected on the part of the respondents, that the proof of this fact rests upon evidence of what has occurred since the order under appeal was pronounced, and ought not, therefore, to be attended to; but this is a re-hearing of the Petition under which Mr. *Petre* has been appointed. The question before us, therefore, is, whether he ought now to be appointed or not—a question of his present fitness or unfitness—and I am aware of no rule which precludes us from receiving upon such a question evidence of what has occurred since the original hearing. Supposing, however, that there was any difficulty upon that point, I apprehend there can be no doubt that the evidence of what has so occurred ought to be looked at as shewing the purpose for which he was proposed, and that it was not proper that he should be appointed at the time when the order appointing him was made.

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It was also argued on the part of the respondents, that their interests ought to be considered in the appointment to be made by the Court, and there would have been great force in this argument, if it could have been considered that Mr. *Petre* was proposed as an independent trustee to act on behalf of, and with a view to, the interests of all the *cestui que trusts;* but when the purpose for which he is proposed is seen, this argument loses all weight and cannot be attended to. It is in the appointment of a trustee for the benefit of all, and not with a view to the interests of some, that the wishes of *cestui que trusts* are to be consulted, for the trustee to be appointed must represent and consult the interests of all, and not of some only of the *cestui que trusts.* It was indeed with this view, that in the course of the argument I suggested to the parties the expediency of their agreeing upon the appointment of an independent trustee.

The third and remaining ground of objection to the appointment of Mr. *Petre* is, I think, open to more difficulty. On the one hand, there cannot, I think, be any doubt that the Court ought not to appoint a trustee whose appointment will impede the due execution of the trust; but, on the other hand, if the continuing or surviving trustee refuses to act with a trustee who may be proposed to be appointed—and I make this observation with reference to what appears to have been said by Mr. *Fleming*, as to Mr. *Petre* having come forward in opposition to his wishes—I think it would be going too far to say that the Court ought, on that ground alone, to refuse to appoint the proposed trustee; for this would, as suggested in the argument, be to give the continuing or surviving trustee a veto upon the appointment of the new trustee. In such a case, I think it must be the duty of the Court to inquire and ascertain whether the objection of the surviving or continuing trustee is well founded or not, and to act or refuse to act upon it accordingly. If the surviving or continuing trustee has improperly refused to act with the proposed trustee, it might be a ground for removing him from the trust. Upon the facts of this case, however, it seems to me that the objections taken by Mr. *Fleming* to the appointment of Mr. *Petre* were and are well founded, and upon the whole case, therefore, my opinion is, that the order under appeal, so far as it appoints Mr. *Petre*, ought to be discharged.

It was strongly pressed in argument, on the part of the respondents, that the appointment of Mr. *Petre* having been made by the Master of the Rolls in the exercise of his discretion, we ought not to disturb it, but in my opinion this is much more a question of principle than of discretion. Besides, there is new evidence before us, and I doubt extremely whether, if the case had stood at the Rolls as it stands before us, his Lordship would have appointed Mr. *Petre*. The interest of Mr. *Fleming* under the will was also relied upon on the part of the respondents as rendering it proper that Mr. *Petre* should be appointed, but Mr. *Fleming's* interest cannot render it proper to appoint a person who, on other grounds, ought not to be appointed. All that we can do in this respect is to take care that a proper trustee or trustees be appointed.

There remains then the question whether Lord *Camoys* ought alone to be appointed to be the trustee in the place of Mr. *Stonor*, and in my opinion he ought to be so appointed. The power of appointment of new trustees created by this will, authorizes the appointment of more than one person in the place of a deceased trustee under an exercise of a power, but it goes no further. It does not, if it could, extend to an appointment by the Court, and certainly it in no way affects the discretion of the Court in making its appointment, though it may incline the Court more readily to appoint more than one trustee. The case, however, stands thus, that putting Mr. *Petre* out of the question, there is no proposal before us, except for the appointment of Lord *Camoys*, and we ought not, I think, to subject this estate to the expense of a further contest on the trusteeship, unless we were satisfied that Lord *Camoys* ought not to be appointed, more especially as there is a suit pending, in which any question of doubt or difficulty can be settled. On examining the evidence before us, I do not find any reasonable objection to his appointment. Lord *Camoys*, it is said, is the friend of Mr. *Fleming*, but I do not think this presents any well founded objection to his appointment; I see no reason to suppose that he will be advised to act, or that he will act, at the dictation of Mr. *Fleming*, or otherwise than as he is bound to do in the *bonâ fide* exercise of an independent judgment with a view to the benefit of all the parties interested under this trust; and I hope that what I have said upon this subject will be communicated and

L. JJ. 1866 *In re* TEMPEST.

recommended to him for his observance in the difficult duties he is called upon to discharge. The order upon this appeal should I think, be to discharge the order at the Rolls, to appoint Lord *Camoys* to be the trustee in the place of Mr. *Stonor*, and to vest the estate in him and Mr. *Fleming*.

SIR J. L. KNIGHT BRUCE, L.J.:—

The general circumstances alleged and proved in the present case, circumstances to which my learned brother has sufficiently adverted, and which I need not repeat, establish, in my opinion, the unfitness of Mr. *Petre* to be appointed to the present trust, to which, in my opinion, it is clear that the author of the trust never would have consented that he should be appointed. The appointment, therefore, of this gentleman, must be discharged, as to which I desire to express my entire concurrence with my learned brother in what he has said as to the absence of any imputation on Mr. *Petre*, or any question or doubt as to his perfect respectability. The objections to his appointment are quite independent of any such considerations. With regard to Lord *Camoys*, I also agree with my learned brother in thinking there is no objection to his appointment, and the order, therefore, as made at the Rolls, will in effect stand as to the two gentlemen, Lord *Camoys* and the former trustee, omitting Mr. *Petre*. I therefore agree in the order which the learned Lord Justice has pronounced.

Solicitors for the Petitioner: Messrs. *J. & C. Cole.*

Solicitors for Mr. *Fleming* and Lord *Camoys*: Messrs. *Ward & Mills.*

PRATT *v.* JENNER.

Ex parte JENNER.

L. JJ.
1866
July 4.

Order of Divorce Court—Statute 22 & 23 Vict. c. 61, s. 5—Wife's Life Interest —Fund in Court.

A fund was standing in Court in trust for a married woman for life, and after her death for her husband for life. The marriage was dissolved by a decree of the Divorce Court, and an order was made by that Court that the settled fund should be held in trust for the persons who would be entitled if the wife were dead. On the Petition of the husband an order was made by the Court of Chancery directing that the income should be paid to him.

THIS was a Petition by *Robert Jenner* for the payment to him during his life of the dividends of a sum of £712 consols, which was standing in Court in trust for his late wife, from whom he had been divorced.

The marriage took place on the 3rd of April, 1855. The settlement was dated the previous day, and the fund in question, which was the property of the wife, was transferred to trustees upon trust to pay the dividends to the wife for her life for her separate use without power of anticipation, and after her death to the husband for his life; and after the death of the survivor the fund was to be held in trust for the issue of the marriage.

The suit of *Pratt* v. *Jenner* was instituted by the trustees for carrying into effect the trusts of the settlement, and in January, 1865, an order was made under which the fund was transferred into Court.

On the 12th of December, 1865, a decree of dissolution of the marriage was made in the Divorce Court on the ground of the adultery of the wife.

On the 2nd of May, 1866, the Judge Ordinary made an order, upon the Petition of the husband, that the trustees or other persons in whose names the sum of £712 consols was standing should stand possessed thereof in trust for the persons who, under the trusts of the settlement, would be entitled thereto if the wife were then dead.

L. JJ.
1866
PRATT
v.
JENNER.
Ex parte
JENNER.

The present Petition was then filed for the purpose of giving effect to the order of the Judge Ordinary (1).

The Master of the Rolls, in whose Court the Petition was filed, doubted the validity of the order made by the Divorce Court, and at his request the Petition was heard before the Lords Justices.

The late wife of the Petitioner was served with the Petition, but did not appear. No other person was served.

Mr. *A. G. Langley*, for the Petitioner, submitted that the order of the Judge Ordinary was conclusive, and asked that the costs might be paid out of the *corpus* of the fund: *In re Turnley* (2).

The LORDS JUSTICES were of opinion that the order of the Judge of the Divorce Court was within the powers of the Act of Parliament, and granted the prayer of the Petition; but in the absence of the persons entitled in remainder to the fund, they made no order as to the costs.

Solicitor for the Petitioner: Mr. *G. Price.*

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April 18, 19;
July 14.

SOADY *v.* TURNBULL.

Executor—Married Woman Executrix—Liability for Husband's Devastavit.

A married woman executrix proved the will and survived her husband:—
Held, overruling *Stuart*, V.C., that she was liable for a *devastavit* committed by her husband during their joint lives.
Beynon v. *Gollins* (3) commented on.

THIS was an appeal from an order made by Vice-Chancellor *Stuart.*

The suit was originally instituted for the administration of the

(1) The order of the Judge Ordinary was made under the 22 & 23 Vict. c. 61, s. 5, which enacts that "the Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

(2) *Ante*, p. 152.

(3) 2 Bro. C. C. 323; 2 Dick. 697.

estate of Dr. *Anthony Dickson*, who, by his will, dated the 6th of November, 1853, appointed *Dickson Soady*, the wife of *Thomas Eales Soady*, to be his sole executrix. Dr. *Dickson* died on the 22nd of December, 1855, and Mrs. *Soady* proved the will on the 22nd of April, 1856.

On the 3rd of July, 1856, *T. E. Soady* and *Dickson Soady*, his wife, the latter being not only executrix, but also a creditor upon the estate under a covenant contained in her marriage settlement, and a legatee under the testator's will, filed their bill against parties interested under the will for the administration of the estate.

By the decree in the cause, dated the 19th of July, 1856, an account was ordered to be taken of the personal estate of the testator come to the hands of the Plaintiffs, *T. E. Soady* and *Dickson Soady*, his wife, or either of them, or of any person by their order or for their use.

On the 31st of March, 1860, *Thomas Eales Soady*, the husband, died in insolvent circumstances.

On the 22nd of March, 1862, the Chief Clerk made his certificate under the decree, and thereby found that the Plaintiffs had received personal estate of the testator to the amount of £2142 8*s.* 11*d.*, and had paid on account of the estate £1311 12*s.* 5*d.*, leaving a balance due from them on that account of £830 16*s.* 6*d.*

On the 11th of July, 1862, the cause was heard on further consideration, and it was ordered that the accounts should be continued.

On the 3rd of May, 1863, *Dickson Soady*, the wife, died, having by will appointed *A. C. C. Penton* and *J. Turnbull* her executors; and on the 6th of August, 1863, the wife's executors revived the suit.

On the 15th of February, 1865, the Chief Clerk made his further certificate, under the order of the 11th of July, 1862, and thereby found that the late Plaintiffs, *Thomas Eales Soady*, and *Dickson Soady*, his wife, in their lifetime received personal estate of the testator over and above what was stated in the certificate of the 22nd of March, 1862, to the amount of £93 19*s.* 10*d.*, which, with the sum of £830 16*s.* 6*d.* found by the said certificate to be due from them on their former account, made the sum of £924 16*s.* 4*d.*

On the 19th of July, 1865, the cause came on again for further consideration, before the Vice-Chancellor, and it then appeared

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that a further sum of £100 had been received by *Thomas Eales Soady*, and *Dickson Soady*, his wife, making the balance due on that account £1024 16*s.* 4*d.*

The Vice-Chancellor, by his order made upon this hearing, amongst other things declared that the estate of the late Plaintiff, *Dickson Soady*, the wife, was not liable for this sum of £1024 16*s.* 4*d.*

The Defendants appealed from this order so far as respected the above declaration.

Mr. *Greene*, Q.C., and Mr. *Hardy*, for the Appellants :—

The result of the authorities is clear that a married woman executrix is responsible for a *devastavit* committed by her husband. The cases are commented on in the judgment of Lord *Redesdale* in *Adair* v. *Shaw* (1). And the same opinion is expressed by the best text writers (2), and no distinction is drawn by them between *devastavits* committed by the wife personally, and by the husband, during their joint lives. And this is in accordance with the old authorities. In *Bellew* v. *Scott* (3), it was held, that where goods of the testator had been arrested by the husband of the executrix, the judgment was properly *de bonis propriis* of both of them. *Beynon* v. *Gollins* (4), where Lord *Thurlow* is represented to have expressed a contrary opinion, is a doubtful case. The two reports are contradictory to each other.

We admit that during the coverture the husband has dominion over the assets; but, on the other hand, it is by the wife's act that he acquires this power. For if she is sole when she proves the will, it is her fault that she takes a husband who wastes the assets: *Mounson* v. *Bourn* (5); *Horsey* v. *Daniel* (6); and if she is married at the death of the testator, as in the present case, she may refuse to prove the will; and if her husband administers without her consent, she can renounce after his death, and thus escape responsibility. But if she accepts probate she will be liable (7). She has also an independent power over the assets, for which she

(1) 1 Sch. & Lef. 243.
(2) Wms. Ex. vol. ii. p. 1667, 5th ed.; Roper's Husband and Wife, vol. i. p. 197.
(3) 1 Str. 440.
(4) 2 Bro. C. C. 323; 2 Dick. 697.
(5) Cro. Car. 519.
(6) 2 Lev. 145.
(7) Wms. Ex. vol. i. p. 204, 5th ed.; Roper's Husband and Wife, vol. i. p. 204; Dyer, 210, *n.*

is responsible even in her husband's life: *Pemberton* v. *M'Gill* (1); *Taylor* v. *Allen* (2); *Kingham* v. *Lee* (3).

Mr. *Malins*, Q.C., and Mr. *Davey*, for the Plaintiffs:—

The husband's power over the assets is as great as if he had been himself appointed executor. He may pay, receive, and recover debts, and if he refuses to sue for a debt his wife cannot oblige him to do so. When money in Court is payable to a married woman executrix, although she is alone named in the order, yet her husband is required to join in the receipt (4). The husband can also assign a lease: *Arnold* v. *Bidgood* (5).

On principle, therefore, it is unreasonable that the wife should be liable for his *devastavit;* and the authorities are by no means conclusive on the other side. In *Beynon* v. *Gollins* (6), whether the report of Lord *Thurlow's* observations be correct or not, it is clear that no relief was granted against the wife. In some of the old cases a *tort* had been committed by the wife personally, and there is throughout the authorities a distinction drawn between the case of a *feme sole* executrix marrying a man who commits a *devastavit*, which is said to be her own fault, as in *Mounson* v. *Bourn* (7), and the case of a *feme covert* being appointed executrix (8). In the present case there is no evidence of any interference by the wife: and the testator appointed her executrix while under coverture, with full knowledge of the fact. *Clough* v. *Bond* (9), and *Kingham* v. *Lee* (10), are authorities in our favour.

Mr. *Greene*, in reply.

July 14. SIR G. J. TURNER, L.J., after stating the facts, continued:—

This case was argued some time since, and we delayed our

(1) 25 L. J. (Ch.) 49.
(2) 2 Atk. 213.
(3) 15 Sim. 396, 401.
(4) Seton on Decrees, 662, 3rd ed.
(5) Cro. Jac. 318.
(6) 2 Bro. C. C. 323; 2 Dick. 697.
(7) Cro. Car. 519.
(8) Wms. Ex. vol. ii. p. 1667, 5th ed.; Roper's Husband and Wife, vol. i. p. 197.
(9) 3 My. & Cr. 490.
(10) 15 Sim. 396.

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judgment upon it partly for the purpose of examining the numerous authorities which were referred to in the course of the argument before us, but principally with a view to consulting upon the question Sir *E. Vaughan Williams*, whose most valuable book upon executors was so largely referred to in the discussion of the case. Upon examining the authorities upon the subject, I have been surprised to find how little is to be found in them in support of the conclusion at which the Vice-Chancellor has arrived. It seems to have been considered, from very early times, that a *feme covert* executrix surviving her husband was liable for a *devastavit* committed by him. In *Mounson* v. *Bourn* (1) the law is thus laid down: "If there be a recovery against a *baron* and *feme* upon a *devastavit* if the *baron* survive the *feme* he shall be charged; also if the *feme* survive she shall be charged." In *Horsy* v. *Daniel* (2) where there was judgment against *baron* and *feme* executors, *quod recuperent debitum de bonis* (omitting *testatoris*), and damages *de bonis propriis* of the husband, in an action of debt on this judgment it was resolved that the action did not lie; for that although the wife, if she survived, was liable for the *devastavit* of the husband, she was not chargeable for the costs recovered against the husband *de bonis propriis*. And in *Bellew* v. *Scott* (3), upon an objection taken to an award of execution against executors upon a judgment against their testator, that the proceedings were against a man and his wife as executrix, and the *devastavit* returned in this manner, "that goods of the testator did come to their hands sufficient to pay the debt which they (that is husband and wife) have wasted and converted to their own use," the Court said that the precedents are so as this in the case of a *feme* executrix; and the case in Cro. Car. 519, was referred to in order to show that the judgment on such a return should be *de bonis propriis* of both. I pass by several other cases in which the same conclusion appears to have been arrived at, as they may possibly be distinguished, some of them being cases in which there were personal torts by the *feme*, and others cases in which the *feme* was executrix before her marriage, although I am not prepared to say that any sound distinction can be taken on either of these grounds. It is not until we come to

(1) Cro. Car. 519. (2) 2 Lev. 161.
(3) 1 Str. 440.

the case of *Beynon* v. *Gollins* (1) that I find any doubt suggested as to the liability of the wife surviving; but in that case Lord *Thurlow* appears to have held that she was not liable, for I think that, looking to the facts of that case as appearing in the note to Mr. *Eden's* edition of *Brown's* Reports, it can hardly be doubted, notwithstanding the different report of the case by *Dickens*, that it was so held by Lord *Thurlow;* and looking to the frame of the suit I find the greatest possible difficulty in reconciling her having been held to be liable with the decree which appears to have been made. Whatever weight, however, might have been due to this opinion of Lord *Thurlow's*, it seems to me to be removed by the masterly exposition of the law upon the subject which is to be found in Lord *Redesdale's* judgment in *Adair* v. *Shaw* (2), and by the authorities which are referred to in that judgment, to which it may be added that the analogy to the case of trover on which Lord *Thurlow* seems to have relied seems to be answered by *Bellew* v. *Scott*, which does not appear to have been cited in the argument before him.

Upon the authorities, therefore, speaking with all respect to the Vice-Chancellor, I think that the declaration contained in this decree cannot be supported, and I am confirmed in this opinion by that of Sir *E. Vaughan Williams*, than whom a higher authority upon such a point as this could not possibly be found. His opinion is most decided in favour of Lord *Redesdale's* view. What he says upon the subject is this:—That the wife's having become executrix was her own act, that the legal consequence of that act was to confer authority upon her husband to deal with all the assets of the testator, and that it follows that all his acts in respect of them must be regarded as done under her authority, and that she is consequently responsible for them as executrix. He puts the case of a creditor of the testator after the death of her husband bringing an action against her as executrix, and her pleading *plene administravit*, that is, that she had no assets of the testator to answer the debt, and issue joined thereon, and intimates that on the inquiry as to the amount of assets which had reached her she would be charged with all the assets which had come to the hands of her husband, by virtue of her being executrix, and would

(1) 2 Bro. C. C. 323; 2 Dick, 697.

(2) 1 Sch. & Lef. 243.

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not be allowed to discharge herself by shewing that he had refused to hand them over to her, and had applied them to his own purposes. And with reference to the case which was put in the argument before us, of a husband refusing to sue for a debt, and so occasioning its loss or releasing it, he observes, that it is no greater injustice to the wife to hold her responsible in that case, than it would be in the case of the husband, in spite of her remonstances, refusing to hand over to her the money he has received in her right as executrix, and insisting on spending it on his own account. I fully concur in these observations of Sir *E. Vaughan Williams*, and in his opinion upon the case, and unless therefore my learned brother differs from me, there must be an order reversing this decree so far as it is complained of by the appeal.

SIR J. L. KNIGHT BRUCE, L.J.:—

I felt so much difficulty in this case, that I had great doubt whether it was right to regard this order as one which ought to be reversed. But maturer consideration has induced me to think that this decision is not in accordance with the weight of authority, and therefore that I may be justified in agreeing to a reversal. It is a case of very considerable difficulty, but in the common agreement of my learned brother and Sir *E. Vaughan Williams*, I have submitted to their view. The costs will be paid out of the estate.

Solicitors for the Plaintiffs: Mr. *Biggenden.*
Solicitors for the Defendants: Mr. *R. H. Peacock.*

MARTIN *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY.

L. C.
1866
May 25, 30; June 23, 29.

Lands Clauses Consolidation Act, 1845, ss. 18, 108, 124—*Equitable Mortgagees—Foreclosure—Conveyance—Railway Company.*

A railway company requiring land, paid a sum of money into Court, and gave the usual bonds to the landowner and to his mortgagees by deposit, and took possession of the land. The company proceeded with the inquiry into the amount of compensation as against the landowner, the mortgagees being aware, though without formal notice, of the inquiry, but taking no part in it. The compensation awarded was less than the amount in Court, and was not sufficient to pay the debt due to the mortgagees, and a suit being instituted by them the sum in Court was transferred to that suit, and ordered to stand as a security under the *Lands Clauses Consolidation Act*. On the cause being heard:—

Held, (reversing the decision of *Stuart*, V.C.), that the mortgagees had no lien on the sum in Court:

Held also, that they were not bound by the inquiry, and were, as equitable mortgagees, entitled, in default of payment, to an assignment by the company and the landowner of the land comprised in their security:

Held also, that the 124th section of the Act did not apply.

SLIOMIA STERNE and *John Lane*, two of the Defendants in this case, were partners, carrying on the business of wheelwrights in *Newington Causeway*, upon certain leasehold hereditaments, of which *Sterne* was the lessee. The title deeds of the leaseholds had been deposited by *Sterne* with the Plaintiffs, Messrs. *Martin & Co.*, bankers, as security for the floating balance due from him before he took *Lane* into partnership, and it was disputed whether the deeds remained a security for *Sterne's* debts alone, or for those of the partnership; and, also, whether the whole of the leaseholds occupied by them were comprised in the security. There had been other disputes between *Sterne* and *Lane*, and in a suit instituted by *Lane* against *Sterne* a receiver was appointed, and the leaseholds were ordered to be sold.

Soon after this, the *London Chatham and Dover Railway Company*, requiring a part of these leaseholds, on the 24th of February, 1862, served the usual notices to treat on *Sterne* and *Lane*. The company were subsequently informed of the charge of Messrs.

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Martin & Co., and as they required immediate possession, they deposited in the bank, to the account of *John Lane* and others, the sum of £4200, being the amount of the valuation made under the *Lands Clauses Consolidation Act*, and they gave a bond to *Sterne* and *Lane*, and also a bond to the Plaintiffs, in the usual form, under the 85th section of the *Lands Clauses Consolidation Act*.

Certain proceedings then took place between the company and the parties to the suit of *Lane* v. *Sterne*, which resulted in an arrangement that the company should be at liberty to proceed with the inquiry as to the compensation to be paid, on the deposit, with an additional sum of £4200, making altogether £8400, being transferred and paid into Court to the credit of the cause of *Lane* v. *Sterne*, to an account entitled *Ex parte London Chatham and Dover Railway Company*.

On the 30th of November, 1863, the inquiry took place as between the company and *Sterne* and *Lane*, and the compensation was assessed at £7560, of which £3500 was for the value of the leasehold exclusive of plant, £3136 for plant and fixtures, and £924 for good-will. The Plaintiffs had been served with no formal notice of any of the proceedings in the suit, or on the inquiry, and took no part in the inquiry, but it was admitted that they were aware of it, and in fact that their solicitor had attended as a witness with the deeds.

The reason of this was stated at the bar to be, that all parties expected that the compensation would be much larger, and enough to cover the debt due to the Plaintiffs, which was then upwards of £7000. As, however, they had no charge on the good-will, the compensation was insufficient. There was also a dispute whether all the leaseholds were comprised in the Plaintiffs' security, and this, if decided against them, would still further reduce their security.

The compensation being thus insufficient, a correspondence immediately ensued between the company and the Plaintiffs, and on the 18th of December, 1863, the Plaintiffs filed their bill against the company and *Sterne* and *Lane*, and soon afterwards obtained an injunction restraining the company from further pulling down the buildings, &c., until the purchase-money and com-

pensation due to the Plaintiffs should be assessed and paid. On appeal, the injunction was maintained; but on a further application by the company, the Lords Justices dissolved the injunction on the terms that the £8400 then in Court should be carried "to an account entitled *Ex parte London, Chatham, and Dover Railway Company*: the account of *J. Lane* and *S. Sterne*, *J. G. Martin*, and *R. Martin*: *the* £8400 *so carried over to be treated as a deposit by way of security, under the* 85*th section of the Lands Clauses Consolidation Act*, 1845: the order to be without prejudice to the questions between *Lane* and *Sterne* and the company."

The bill was afterwards amended, and the suit came on upon motion for decree, the Plaintiffs asking, by the second paragraph of the prayer, that the amount due to them, and the costs, might be paid out of the purchase-money or compensation payable by the company in respect of the premises and plant: by the third, that the purchase-money or compensation might be ascertained under the *Lands Clauses Consolidation Act*, or in such other manner as the Court might direct: by the fourth, that the sum of £8400 so carried over, or a sufficient part, might be applied in payment of the Plaintiffs' claim: and by the fifth and subsequent paragraphs that if the Plaintiffs were not entitled to such relief, then that the premises might be sold, and the proceeds applied in payment of the Plaintiffs' claim.

The company, by their answer, contended that the sum of £8400 was in fact or under the order to be treated as a deposit by way of security, under the 85th section of the *Lands Clauses Consolidation Act*, and that on payment of the sum found by the jury, this sum belonged to the company. They further contended that the Plaintiffs were bound by the verdict of the jury.

It was also alleged by the Plaintiffs, but denied by the Defendants, that the company had so altered the character of the property as to render any second inquiry by a jury useless.

The motion for a decree came before Vice-Chancellor *Stuart*, who, on the 6th of November, 1865, made a declaration that the Plaintiffs were entitled to be paid their debt and costs out of the sum of £8400 in Court, and gave consequential directions (1).

(1) Law Rep. 1 Eq. 145.

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The company appealed.

Mr. *Greene*, Q.C., and Mr. *T. Stevens*, for the Plaintiffs, cited *Ranken* v. *East and West India Docks, &c., Company* (1), and *Walker* v. *Ware Hadham and Buntingford Railway Company* (2).

The *Attorney-General* (Sir *R. Palmer*), Mr. *Malins*, Q.C., and Mr. *Kekewich*, for the company:—

The Plaintiffs were aware of the inquiry, and are bound by it, under sections 17, 18, and 23 of the *Lands Clauses Consolidation Act*, and are only entitled to an inquiry as to how much of the compensation money they are entitled to. In all the cases of purchases by railway companies there has not been one in which mortgagees have been treated with separately. The *Lands Clauses Consolidation Act* never contemplated several juries and several awards. If this were allowed, railway companies would never be able to get final possession of their land. The policy of the law has always been to have the litigation between one person interested in the land and the company, and then the money takes the place of the land. The money is only paid into Court to remain until the compensation has been awarded and paid. In *Ranken* v. *East and West India Docks, &c., Company* (1), the money had been paid to the account of the mortgagor alone. The Act draws a clear distinction between persons entitled to the land, and persons who are entitled to sell and convey, and a mortgagor is enabled to sell and convey without the concurrence of the mortgagee. [They also referred to *Govett* v. *Richmond* (3).]

Mr. *Bacon*, Q.C., and Mr. *A. E. Miller*, for *Lane*, and Mr. *Shebbeare*, for *Sterne's* assignees, were not heard, they not having appealed.

Mr. *Greene*, in reply:—

The company were bound to proceed under the mortgagee clauses in the Act, sect. 108.

The LORD CHANCELLOR:—Does the Act mean that in any case there shall be two inquiries? I think that cannot be so. The

(1) 12 Beav. 298. (2) Law Rep. 1 Eq. 195. (3) 7 Sim. 1.

Legislature must have supposed that it had given the means of ascertaining the value by one inquiry.

Mr. *Greene*:—The case is clearly provided for by the Act, and yet the company have neglected the mortgagees entirely. The deposit was not enough, they ought to have given security for the plant. The interference of the company has prevented the Plaintiff from being paid, and the Court has a right to treat the money in Court as a security to us.

June 23. LORD CRANWORTH, L.C., after stating the facts of the case, continued:—

When the cause came on for hearing, the question was, what relief the bankers were to have, it being certain that they had been equitable mortgagees. His Honour, the Vice-Chancellor *Stuart*, considered that he might treat the sum which had been paid into Court as a sum which was to be a security for what was due from the depositors to the bankers. With all deference to his Honour, I think there is no good foundation for such a suggestion as that. The £8400 was deposited upon the express contract, or express right, created by the statute, that it should stand as a security for such sum as the jury should award to be sufficient compensation for the lands which the company should take: and I think that if it was transferred by arrangement into the name of the cause, the Court can have no more right to deal with that fund so as to give it a different direction than they could have had, if it had stood *simpliciter* in the mode pointed out by the statute. Therefore I think that the Vice-Chancellor was clearly wrong in the conclusion at which he arrived.

It is however very difficult to come to a conclusion as to what ought to be the exact relief given in such a case as this. The first question is, what is the course which the company ought to have taken considering that this property of Messrs. *Lane* and *Sterne*, which they were proposing to take, was, and was known by them to be, subject to an equitable lien. In my opinion it was clearly the duty of the company to have given notice under the 18th section,

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not only to *Sterne* and *Lane*, but also to the mortgagees, as parties interested, according to the language of that section, for it is perfectly clear that Messrs. *Martin* had an interest in these lands, and it is also clear that this was known to the railway company, and indeed they said, we will take care of and protect your interest. That being so, it is clear they did not take the proper course.

What then is the remedy which the bankers may have? I have looked at the statute, and I am not at all clear that such a case is provided for, but I do not think they are bound to recur to the 68th section if they do not think fit to do so, and there are great embarrassments, looking at the Act, in seeing how they are to get the jury. It may be that they have the means, but it is a complicated means. I think they stand in this position. They are equitable mortgagees. No proceedings have been duly taken by any person under the statute to deprive them of their rights as equitable mortgagees; and to those rights they are therefore entitled as if nothing had been done. That is the right which I think they retain. It may be said that there is a great difficulty created, because that which was deposited in their hands was the title deeds of a going concern or trade of a wheel manufacturer; all of which is entirely abolished, and the line of railway is taken across it. I do not think that that signifies at all. The company had a right, under the statute, to take possession, and had a right to convert the land, against all the world, into the railway which they have made. They had a right to do that under the provisions of the 85th section: therefore, if what they have done has diminished the value of the security, I do not think that the Plaintiffs have any right, legally or equitably, to complain of that; neither have the company any right to complain if, having dealt with that piece of land without having a proper title to it, they are now in such a condition that a slice of their railway may be taken away from them, which would, in other words, be a proceeding in the nature of a distress, compelling them to pay whatever can be lawfully demanded from them.

I ought to advert to one circumstance, which is this. It is said that, although the proceedings were against *Sterne* and *Lane* only, and not against the bankers, the depositees and equitable mortgagees, still they must be treated in this Court as having

been parties, because they assented to it and were perfectly cognizant of what took place, and only interfered because they found that the sum awarded was not sufficient to pay them the amount of what was due. I agree entirely that they were aware of all that was proceeding, and I believe further that they did not care at all, they were content that it should go on only with *Sterne* and *Lane*, because they were satisfied that there would be money enough for all parties; and not only did they not interfere, but they could not interfere. If the company chose to deal with the owners of the equity of redemption, so to say, and not with the mortgagees, the mortgagees were helpless, and could do nothing. They were certainly well aware that the inquiry was going on, and of course knew that, not having been served, they could take no part in it. They did not and could not interfere, and it did not prejudice them whether there had been the proper sum found or not.

Now it is said, that this was analogous on their part, to the case of a person standing by and seeing two people, against one of whom he has a right, settling their demands against one another by arbitration, and it is said that then the person standing by, and not apprising the parties, is bound by it. There seems to me to be no analogy between the two cases, because in that case there is a concealment, whereas here there is no concealment. The case of *Govett* v. *Richmond* (1) was referred to; whether it was rightly decided or not, I give no opinion, but there the ground on which Vice-Chancellor *Shadwell* proceeded was, that Mr. *Bignold* was bound to disclose, and did not disclose his right, and therefore, he was bound by the negotiation between the other parties. That has no similitude to a case like this, where the rights of all these parties were known to the other parties who were litigating, and all that the mortgagees knew was, that the company were dealing, as it were, for the purchase of the equity of redemption. I suppose that both thought it did not at all concern the mortgagees, because there would be ample to satisfy them. It appears to me, therefore, that there was no sort of conduct which at all affects the rights of these parties. That being so, I think the parties must be dealt with just as if the

(1) 7 Sim. 1.

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company had purchased the equity of redemption, leaving the Plaintiffs as their mortgagees.

Then what is the relief to which they are entitled? I have already said I cannot think they are entitled to any part of the relief given to them by the Vice-Chancellor, because I think the £8400 was a security for something totally different. It is a security for what the jury should find, but until there is a jury summoned, and a jury is instructed to find what was due to the Plaintiffs, that security must be unavailable for that purpose. Therefore I think that the Vice-Chancellor's decree was wrong; and I think, further, that the Plaintiffs are entirely wrong in so much of their prayer as asks for relief upon the footing of their being entitled to some relief under the Act of Parliament, for the relief they are entitled to is a relief which they are entitled to because they are not affected by the Act of Parliament.

The relief which they are entitled to, in my opinion, is the common relief of an equitable mortgagee by deposit, and consequently I think that the decree must be discharged, and a new decree made, dismissing the bill with costs, so far as it seeks relief founded upon the 2nd, 3rd, and 4th paragraphs of the prayer: and there must be a declaration that the Plaintiffs are entitled to an equitable lien on the property comprised in the deed deposited for the balance due on the banking account of *Sterne* and *Lane*. An account must be taken of what is due upon that account for principal, interest and costs, other than the costs to be paid by them as aforesaid, which must be set off, and declare that the amount so due is a charge upon the property comprised in the deeds. And on payment to the Plaintiffs (as in the common case of foreclosure) by the company within six months of what shall be found due with interest at that time, and costs, to deliver up to the company all deeds, &c., relating to the premises, and in default declare the Plaintiffs entitled to all the property comprised in the deeds deposited, and to have an absolute conveyance to be settled by the Judge in case the parties differ.

The *Attorney-General*, on behalf of the company, called the attention of the Lord Chancellor to the 124th section of the *Lands*

Clauses Consolidation Act, and wished it to be stated whether the company were to settle with the Plaintiffs under that section.

Mr. *Shebbeare*, for the Defendants *Lane* and *Sterne*, who not having appealed had not been heard, said that they had not appealed because the original decree did not injure them, but wished now to be heard as the decree proposed would affect their interests.

Mr. *Greene*, for the Plaintiffs, asked that as much as had been awarded for fixtures and plant might be paid to them out of the fund in Court, as that portion of their security had been entirely swept away.

The LORD CHANCELLOR consented to re-consider the decree.

The Ministry having soon after this resigned, the counsel and solicitors attended the Lord Chancellor in his private room on the 29th of June, and the Lord Chancellor then delivered judgment to the following effect:—

When I delivered judgment in this case, the Defendants *Lane* and *Sterne* objected that the variation in the decree would be to their prejudice, and though, as they did not appeal, they could not be heard against the decree, yet they might certainly be heard in support of it. I have reconsidered the matter, and I see no reason for thinking that the decree I intend to make will prejudice those Defendants. I consider the security of the Plaintiffs to be on the property comprised in the deeds deposited, and not on the fund in Court; and as these Defendants have, by means of the proceedings under the statute, been deprived of the equity of redemption, and indeed of all interest in the property, they can have no ground of complaint in respect of the variation which I intend to make in the decree.

As to the argument on the 124th section of the *Lands Clauses Consolidation Act*, I think that that section does not apply, as it was through no mistake or inadvertence that the company neglected to purchase the interest of the Plaintiffs. They knew per-

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fectly well what it was, and had actually given them a bond under the 85th section, but the company thought fit to deal with the owners of the equity of redemption alone, and if the jury had assessed the amount to be paid at a sum exceeding the amount due to the Plaintiffs, no difficulty would have arisen. I am satisfied that all parties believed that this would be the result, and to that belief it was owing that the Plaintiffs were not made parties to the inquiry. In this belief they were mistaken, but the mistake is not, in my opinion, one which brings the company within the provisions of the 124th section. They had express notice immediately after the verdict that the Plaintiffs did not hold themselves bound by it, and insisted on their rights as equitable mortgagees. If under these circumstances the company chose to disregard the interests of the mortgagees, they must abide the consequences. I have been referred to the cases of *Duke of Beaufort* v. *Patrick* (1); and *Somersetshire Coal Company* v. *Harcourt* (2): but they have no bearing on this case. The first turns entirely on acquiescence, but here the mortgagees gave notice from the first of their adverse rights, and that they should assert them against the company. The other case also turns on acquiescence after a long period, and is inapplicable.

His Lordship then stated minutes of decree to the following effect:—

"Dismiss, with costs, so much of the Bill as relates to the relief sought by the 2nd, 3rd, and 4th paragraphs of the prayer. Declare that the Plaintiffs have a lien for principal and interest due to them from *Lane* and *Sterne*, such lien extending only to the estate and interest of *Sterne* in the property. Take the accounts, and upon the company paying to the Plaintiffs, &c., what shall be found due to them, let the Plaintiffs deliver up their securities. But in default, let the company, and, if necessary, *Lane* and *Sterne*, execute to the Plaintiffs an assignment of all the property comprised in the memorandum of deposit, to the extent of the interest which *Sterne* had therein at the time of the deposit; any of the parties to be at liberty to apply as to the £8,400."

Mr. *Greene*, for the Plaintiffs, suggested that the Plaintiffs had lost part of their security, as the plant, fixtures, &c., had been swept away by the company.

The LORD CHANCELLOR said that the Plaintiffs would get a

(1) 17 Beav. 60. 2 De G. & J. 596.

piece of the railway itself, and the company would be obliged to pay them. The Plaintiffs must take what they find, or else they would have to come in under the 124th section.

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Solicitor for the Plaintiffs: Mr *Charles Stevens.*
Solicitors for the Company: Messrs. *Freshfields & Newman.*
Solicitor for Mr. *Lane*: Mr. *T. Lee.*
Solicitor for the Assignees of Mr. *Sterne:* Mr. *Abrahams.*

In re AGRICULTURISTS' CATTLE INSURANCE COMPANY.

L. C.
1866
July 18, 25.

STEWART'S CASE.

Company—Forfeiture of Shares—Time—Notice.

At a meeting of a company it was resolved that a large call should be made, and that any shareholders who wished to retire, and accepted the terms proposed before a certain day, might pay a part of the call, and that then their shares should be forfeited for non-payment of the rest. A shareholder accepted these terms after the day fixed, and his shares were declared forfeited by the directors:—

Held, reversing the order of the Master of the Rolls, that though the shareholder might have been able to retire if he had accepted before that day, the directors had not power under the circumstances to declare the shares forfeited, and that he remained a shareholder.

THIS was a motion to place the executors of Mr. *J. Stewart* on the list of contributories of the *Agriculturists' Cattle Insurance Company*, in respect of twenty shares. The facts relating to this company are fully stated in the report of *Stanhope's Case, ante* p. 161. As to Mr. *J. Stewart*, he became a shareholder, executed the deed of settlement, received a dividend, and paid calls. He did not accept the terms of the *Chippenham* compromise within the time limited, or, indeed, during his life. After his death in 1849, his executors agreed with the directors that the executors should pay £71, which would be the sum payable if he had come in under the *Chippenham* compromise, and that thereupon his shares should be declared forfeited, as under the *Chippenham* compromise. This was accordingly done, and a return of the forfeiture of the

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twenty shares was made to the Registrar of Joint Stock Companies on the 8th of March, 1850. The further special facts in this case distinguishing it from *Brotherhood's Case* (1), are stated by his Lordship in his judgment below.

A motion was made before the Master of the Rolls to place the names of the executors upon the list as contributories, and was refused with costs (2). The official manager appealed.

The *Attorney-General* (Sir *H. M. Cairns*), and Mr. *Bush*, for the official manager, cited the cases cited in *Stanhope's Case*, and said that *Brotherhood's Case* was under appeal, but admitting it to be well decided, no shareholder could escape who did not actually come in under the *Chippenham* compromise before the day fixed.

Mr. *Baggallay*, Q.C., and Mr. *F. C. J. Millar*, for the executors, said that the terms in this case were exactly those of the *Chippenham* compromise. There was no reason to limit the time within which that arrangement might be adopted; time was not of the essence of the contract, and such a matter must be left to the discretion of the directors, otherwise no company could be carried on. The large sums received for cancelled shares were before the eyes of the shareholders for sixteen years without any objection being made.

(1) 31 Beav. 365; on appeal, 8 Jur. (N.S.) 926.

(2) The judgment of the Master of the Rolls (June 6) was as follows:—

"I am of opinion that this case comes exactly within *Brotherhood's Case*, and that it is really acceding to the *Chippenham* arrangement.

"Then the only question I have to consider is this point of time, and upon that question I am of opinion that the lapse of time which occurred down to the month of January, 1850, is not sufficient to deprive the representatives of Mr. *Stewart* of that advantage.

"I confess these cases are very difficult, and I have always felt considerable difficulty about them. I have always held that the word "fraud" means a culpable fraud, a great moral guilt; and that, of course, would prevent any lapse of time from running; but that question does not arise in this case at all, because this is simply the *Chippenham* arrangement, of which the Lord Justice *Turner* observed—making a very forcible observation, in which I fully concur—that if he were sitting as a juryman he should find as a fact that every member of the company knew of the *Chippenham* arrangement. It is true there is a letter given in evidence in which some gentleman is informed that it was too late for him to come in; but if they chose to admit him afterwards, I am of opinion that the company would have been bound.

"I shall therefore hold that Mr. *Stewart's* executors are not to be put upon the list of contributories."

Mr. *Bush*, in reply.

LORD CHELMSFORD, L.C.:—In all these cases the question has always been whether they were within *Brotherhood's Case*. The question which I have to determine therefore is, whether I can distinguish between that case and the present.

July 25. LORD CHELMSFORD, L.C.:—

This case was decided by the Master of the Rolls on the ground that it came exactly within *Brotherhood's Case* (1), and his Lordship held that the accession of Mr. *Stewart's* executors to what is well known in this company as the *Chippenham* arrangement, freed them from liability to be placed on the list of contributories.

The case of *Brotherhood* has always been considered to have been rightly decided when questions have since arisen as to the list of contributories to this company. It is certainly a strong decision, because, starting with an arrangement which is admitted on all hands to have been *ultra vires* of the directors, and which could be made good only by the consent of all the shareholders, it was assumed that the length of time during which the arrangement had never been questioned amounted to evidence that all the shareholders had consented to it. It seems to be involved in this assumption, that if the consent of the shareholders could not be presumed to have been given, the arrangement would have continued to be of no force or effect, as being beyond the competency of the directors. It seems important, therefore, to see what was the arrangement to which the shareholders are to be presumed to have consented, and what were the conditions to be performed by every shareholder who sought to take advantage of it to withdraw from the company.

It appears that the company had incurred liabilities which it was found difficult to meet, and that some of the shareholders were anxious to have the affairs wound up, but the directors and

(1) 31 Beav. 365; 8 Jur. (N. S.) 926, 905.

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others of the shareholders were desirous of continuing the company. For the purpose of raising money to liquidate the debts, a scheme was proposed to a general meeting, held on the 2nd of November, 1848, and a resolution agreed to, that notice of the proposal should be given to all the shareholders, in order that their opinion might be taken thereon. In accordance with the resolution, a circular was addressed and sent to the shareholders enclosing the propositions made at the meeting of the 2nd of November, entitled, "terms proposed by shareholders who wish to withdraw from the company." The only part of the terms necessary to be noticed are the following:—"All calls to the present time to be paid up. A call of £3 per share to be made on the capital stock of the company, and the directors be empowered to forfeit shares of retiring shareholders on payment by them, in proportion to the number of their shares, as follows: holders of shares under one hundred" (in which class Mr. *Stewart* stood, having twenty shares) "to pay £2 10s. per share." And the circular to the shareholders was in these terms: "I request that you will sign the accompanying form should you wish to retire from the company upon the proposed terms. The special general meeting has been adjourned, to be held at the *New Hall, Chippenham*, on Monday, the 13th inst., at twelve o'clock at noon precisely; and in case you should not attend, or return the accompanying form, duly signed, on or before that date, you will be held as declining to concur in the propositions submitted to the meeting."

This, then, was the agreement to which the shareholders are assumed to have given their consent; that any shareholder who came in by the day named, and agreed to comply with certain conditions, should be allowed to retire from the company; but that all who did not signify their assent to the terms proposed by that day, should be taken to have elected to continue shareholders.

There is no *locus pœnitentiæ* offered to shareholders who might suffer the day to pass without signifying their assent to the offered terms; their rights with respect to the company were to be settled from that day. If the shareholders had one and all given an express consent, it could only have been to the arrangement on those precise terms. They would not have been bound to it as a stand-

ing arrangement to which shareholders might accede at any future time, and then cease to belong to the company.

With respect to the question of time being of the essence of the arrangement, there can be no doubt. The company being pressed with liabilities, and having proposed a plan to relieve themselves, it was most important that they should know what sum they could raise for this purpose, and that could be ascertained only by fixing a particular day by which at the latest the option offered to the shareholders should be declared. No other terms, nor any other time, can be presumed to have been consented to by the shareholders; and if the arrangement without their consent would have been *ultra vires*, any arrangement with a shareholder which departed from the terms, either in point of time or of amount, was equally beyond the power of the directors. This makes the whole difference between *Brotherhood's* and the present case. *Brotherhood*, as appears from the report, received the circular, and signed the form thus, "I am desirous of retiring from the *Agriculturists' Cattle Insurance Company* on the above terms." He also attended the meeting at *Chippenham*, and afterwards paid the proper amount upon his shares. He therefore strictly complied with all the requisite terms, and within the prescribed time. Mr. *Stewart* never himself acceded to the arrangement. His executors assign reasons for his not having done so. He was in *Scotland*. He sent a mandate to attend the meeting, which his mandatory did not receive in sufficient time. Having been advised to accept the *Chippenham* arrangement, nothing was done during his life owing to his failing health, both of body and mind. His trustees and executors after his death were not aware for some time that he was a shareholder, but at last being desirous of availing themselves of the *Chippenham* arrangement, they paid the exact sum which they were required to pay under that arrangement, together with the amount of an overdue call, and a small sum for interest upon that call. It is quite immaterial what were the circumstances which prevented Mr. *Stewart* from acceding to the arrangement within the proper time. The directors had no power to allow him to come in at a later period. It is unfortunate that his intentions were frustrated by the circumstances which have been stated, but the company

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had a right to say, "we agreed to the discharge of shareholders upon certain specific terms and no others; you have not complied with those terms, and therefore have not brought yourself within our agreement." It is almost unnecessary to observe that the classification of the retiring shareholders in the list of the official manager, where *Brotherhood* and *Stewart* are placed in the same class, cannot have the smallest effect in determining the question of liability. I am compelled to differ from the opinion of the Master of the Rolls, and must reverse his order, and direct Mr. *Stewart's* trustees and executors to be added to the list of contributories.

Solicitors for the Official Manager: Messrs. *Horn & Murray.*

Solicitors for Mr. *Stewart's* Executors: Messrs. *Jones, Blaxland, & Jones.*

L. C. 1866. *July* 14.

In re CORBETT.

Lunacy—Sale of Land—Life Estate.

The 125th section of the *Lunacy Regulation Act*, which enables the Court to sell, for building purposes, land of which the lunatic is seised in fee-simple, does not apply to estates of which the lunatic is tenant for life; and where the income is more than sufficient for the maintenance of the lunatic the Court is not authorized to sell real estate under the 116th section.

ELIZABETH CORBETT, the lunatic in this case, was tenant for life of several houses in and near *Nag's Head Court*, in the city of *London*, of which leases had been granted for the term of her life, at rents yielding altogether the net sum of £641. The *London and County Land and Building Company* had bought the reversion, and had also acquired the leases, and wished to pull down the houses and build on the site: for which purpose they desired to purchase the life estate of the lunatic, and entered into a provisional agreement with the committee for the purchase, in consideration of a government annuity of £702 for the life of the lunatic, to be purchased by the company. The sum of £430 a year was allowed for the maintenance of the lunatic. The committee now presented this Petition in lunacy to have the provisional agreement carried into effect, the only question being, whether the

Court had power to direct the conveyance of the life estate, or a lease for a term of years determinable on the life of the lunatic.

The Lords Justices felt doubtful, and wished the Petition to be brought before the Lord Chancellor.

Mr. *Bacon*, Q.C., and Mr. *Prendergast*, for the Petitioner.

Mr. *Greene*, Q.C., and Mr. *Everitt*, for the company, cited *Dodd* v. *Wake* (1).

Mr. *Wickens*, appeared for the Crown, the lunatic being illegitimate and having no issue.

LORD CHELMSFORD, L.C.:—

It is extremely desirable that this order should be made if it is within the competency of the Court to make it, for it is to the advantage of all parties. It is therefore a case in which the Court is tempted to exceed its jurisdiction, and must be on its guard to resist that temptation. Mr. *Bacon* contended that the Court has this power under its original jurisdiction in lunacy. I think that he is in error, but that at all events the power must now be governed by the *Lunacy Regulation Act*, 16 & 17 Vict. c. 70. That Act extends and defines the powers of the Court, and the Court must confine itself within the limits defined. Then has this Act of Parliament conferred the power which I am asked to exercise. In the first place, I am referred to section 125, which enables land to be sold for building purposes, but this applies merely to the case of a lunatic seised of or entitled to land in fee simple, and though it is reasonable to say, that where power is to be exercised over land held in fee simple it must cover any smaller interest, still by the words of the Act the power is confined to this interest alone.

Then reliance is placed upon the 116th section as conferring a general power upon the Lord Chancellor, but, taking the whole of the section together, the power is clearly limited to the purposes specified. Again, it is contended that the case comes within the 4th clause of that section as provision for future maintenance, but it is clearly not within this clause. There may be cases in which the

(1) 5 De G. & Sm. 226; 16 Jur. 776.

L. C. 1866 *In re* CORBETT.

property applicable to the maintenance of the lunatic may be very small, and it would be much more advantageously applied if sold. But this is not really a sale to provide for the better maintenance of the lunatic, though the effect may be to increase her income. I am bound by the terms of the 116th section, beyond which I am not at liberty to go. I am sorry to come to this conclusion, as the whole arrangement seems to be very fair. The object, as has been suggested, may probably be obtained under the *Settled Estates Act.*

Solicitors: Messrs. *Brundrett & Co.*

L. C. 1866 *July* 25.

In re HERSEE & SMYTH.

Patent—Practice—Extension of Time.

The time within which the application for the warrant and for the letters patent ought to be made under the rules of the Patent Commissioners extended where the delay was small and accidental.

THE Petitioners in this case alleged themselves to be the inventors of an invention of great public utility, and had obtained the usual provisional protection for it. By the third set of rules and regulations made by the Commissioners of Patents for Inventions under the Acts 15 & 16 Vict. c. 83, and 16 & 17 Vict. c. 115, No. 6, it is directed that—

"In the case of all applications for letters patent, the application for the warrant of the law officer and for the letters patent, must be made at the office of the Commissioners twelve clear days at the least before the expiration of the provisional protection: provided always that the Lord Chancellor may, upon special circumstances, allow a further extension of time."

In this case the application for the warrant was not made until three days after the prescribed period, and the officer declined to issue the warrant.

The Petitioners now applied for an extension of the time for applying for the warrant.

L. C. 1866 In re Hersee & Smyth.

Mr. *Theodore Aston*, in support of the application, read affidavits shewing that Mr. *Hersee*, one of the applicants, had met with an accident, under which he was still suffering, and had been unable to attend to the patent, and that the clerk of the solicitors engaged was not aware of the rule as to the twelve days. The usual notices had been given, and there was no opposition.

The Lord Chancellor said that the ignorance of the clerk could not be pleaded as an excuse, and that it did not appear that there was anything to prevent the other applicant from attending to the business. Still it would be very hard to deprive the applicants of the advantages of their invention, and under the peculiar circumstances leave might be given, but this case must not be taken as an encouragement to carelessness. The time for affixing the great seal would also be extended, and all necessary liberty given.

Solicitors: Messrs. *Sturmy & Diggles.*

In re FULCHER.

L. C. 1866 July 9.

Bankruptcy Act, 1861, *s.* 192—*Creditors' Deed—Execution—Attestation.*

The third condition of the 192nd section of the *Bankruptcy Act*, 1861, requires the execution by the debtor of a creditor's deed to be attested by a solicitor; but a power of attorney to execute such a deed need not be so attested.

Mr. *A. FULCHER* and Mr. *W. Cooper* carried on business in partnership at *Liverpool*, and proposed to make an inspectorship deed under the 192nd section of the *Bankruptcy Act*, 1861. Mr. *A. Fulcher* was in *Bombay*, and had executed a special power of attorney, making Mr. *Cooper* his attorney for the purpose of executing the deed. Mr. *Cooper* accordingly executed the deed for himself and for Mr. *Fulcher*, and his execution was attested by a solicitor, as required by the third condition of the 192nd section of the *Bankruptcy Act*, 1861.

The registrar in bankruptcy objected to register the deed, on the

L. C. 1866 *In re* FULCHER.

ground that the execution of the power of attorney was not attested by a solicitor.

Mr. *Horton Smith* now applied, at the request of the Lords Justices, before whom the application had been originally made, for a direction that the deed might be registered under the 192nd section of the Act. *Re Bell* (1) was referred to.

LORD CHELMSFORD, L.C., after conferring with the registrar, said that, as he understood it, the statute said that the deed itself must be executed by the debtor in the presence of an attorney or solicitor. But the power of attorney placed the partner in the present case in the position of the debtor, and the deed was executed by the partner as such attorney in the presence of a solicitor, which was sufficient. His Lordship did not see any difficulty in directing the deed to be registered.

Solicitors: Messrs. *Flux & Argles.*

L. C. 1866 July 9

SPIRETT *v.* WILLOWS.

12 Jur. N. S. 530

Equity to a Settlement—Proportion—Ultimate Remainder.

Where a wife is entitled in equity to a settlement out of a fund, the Court will, in the absence of special circumstances, direct one-half of the fund to be settled on the wife and her children, with ultimate remainder in default of issue to the husband. Order of *Stuart*, V.C., affirmed.

3 De G. & J. 228 post 523

3 Ch. 266-7

4 Ch 249 — 251 — 469. 3 De G. & J. 404-5 — 407-8 2 Ch 482-3

ELIZABETH WILLOWS, at the time of her marriage with *Henry Willows*, was entitled to a sum of £4000, and £2000, part of this sum, was upon her marriage settled upon her for her separate use for life, with remainder to her children, with remainder to her brothers and sisters. A post-nuptial settlement was also made of the remaining £2000. The assignee in bankruptcy of the husband afterwards filed a bill to set aside this post-nuptial settlement, and Vice-Chancellor *Stuart* made a decree declaring it fraudulent and void as against the Plaintiff. His Honour's decision was

(1) 2 D. J. & S. 672.

affirmed by Lord *Westbury* on appeal (1), and his Lordship directed an inquiry whether, having regard to the settlement made on the marriage of the Defendants, Mr. and Mrs. *Willows*, and to the circumstances of the Defendant *Willows*, any and what additional settlement of the sum of £2000 should be made on the Defendant, Mrs. *Willows*, and the children (if any) of the marriage. The chief clerk of the Vice-Chancellor *Stuart*, by his certificate, found that the whole £2000 should be settled. The Plaintiff having moved to vary this certificate, the Vice-Chancellor, on the 17th July, 1865, decided that £1500 only should be settled, subject to payment of the costs of the suit, and directed that it appearing to the Court fit and proper that the sum of £1500 should be settled upon the wife for her separate use for life, without power of anticipation, with remainder to the children of the present or any other marriage, as she might appoint, and in default of appointment to the children equally, with remainder to the Plaintiff as assignee of the husband, the residue to be paid to the Plaintiff as assignee, a proper settlement should be made accordingly. There were no children of the marriage.

Mrs. *Willows* appealed.

Mr. *Bacon*, Q.C., and Mr. *Horton Smith*, for Mrs. *Willows*, contended, first, that the whole £2000 ought to be settled, and next, that the ultimate remainder ought to be to the wife if she survived, and not to the husband. The practice of the Court fluctuated at one time, but it was now settled that the Court will look to the circumstances of each case: *Dunkley* v. *Dunkley* (2); *Kincaid's Trusts* (3); *Carter* v. *Taggart* (4); and the other cases mentioned in *Lewin* on Trusts (5), and *Seton* on Decrees (6). The husband was bankrupt, and there was a very small income, and the wife ought to be placed as nearly as possible as she was before the marriage.

Mr. *Malins*, Q.C., and Mr. *Phear*, in support of the order:—

The rule is that the wife has half the fund: *Napier* v. *Napier* (7),

(1) See 11 Jur. (N. S.) 70. 33 L. J. 293
(2) 2 D. M. & G. 390.
(3) 1 Drew. 326; 17 Jur. 106.
(4) 1 D. M. & G. 286.
(5) 4th ed. 481.
(6) Page 666, *n.*
(7) 1 Dr. & War. 407.

(a) See 5 Giff. 49.

L. C. 1866 SPIRETT v. WILLOWS.

and circumstances must be shewn to entitle her to more. Here the conduct of husband and wife has been as bad as it can be, in trying to defeat the creditors by a fraudulent settlement.

Mr. *Nalder*, for the trustees.

Mr. *Horton Smith*, in reply:—

We say that the usual form is to give the wife the fund settled if she survives the husband, and that there is no reason in this case why that form should be departed from.

LORD CHELMSFORD, L.C.:—

There are numerous authorities on this subject, and the principle which I extract from them all is this, that where a wife is declared to be entitled to a settlement, and the fund is settled under the direction of the Court, the ultimate limitation of the money, even in the event of her surviving her husband, will, in the absence of special circumstances, be to him. And this seems reasonable, because the fund belongs originally to him, and the Court will not deprive him of it without doing that which is equitable, after providing for the wife and children. It appears also to be the rule that, in the absence of special circumstances, one-half of the fund will be settled on the wife and children, leaving the other half to the husband; and it is a matter entirely for the discretion of the Court, under the peculiar circumstances of each case, to make such a settlement of the wife's portion as is equitable and just. There are often circumstances which prevent the Court from following the ordinary rule, and giving the ultimate limitation to the husband; as, for instance, where there has been misconduct on the husband's part, or where he is unable to maintain his wife, or where the fund is extremely small, and in such cases the whole is given to the wife. Now in this case the discretion has been exercised by a Judge of very great experience in matters of equity, and unless I saw very clearly that he had been wrong, I should be very reluctant to disturb his decision. It must be recollected that the wife was not a person in a very high position, and under the settlement on her marriage, the sum of £2000 was settled on her absolutely; the other £2000 became

the subject of a post-nuptial settlement, which was afterwards set aside, whereupon the wife became entitled to a settlement out of it, the only question being how much was to be settled. Under these circumstances, the Vice-Chancellor considered that instead of the husband being entitled to a half according to the ordinary rule, he would be entitled to a quarter only, and that the other three-quarters ought to be settled upon the wife and her children, with an ultimate limitation to the husband. Now supposing the rule to be that the ultimate limitation is to the husband, unless there are special circumstances, the question is, whether there are such special circumstances here, and it appears to me that His Honour has exercised a sound discretion in directing the settlement to be made as he has directed. The appeal must be dismissed with costs.

Solicitor for Mrs. *Willows*: Mr. *F. W. Blake.*
Solicitors for the Plaintiff: Messrs. *Blakeley & Beswick.*
Solicitors for the Trustees: Messrs. *Coverdale & Co.*

In re INTERNATIONAL CONTRACT COMPANY.

Winding-up—Official Liquidator—Discretion.

Where a Judge in the exercise of his discretion has appointed an official liquidator, the Court of Appeal will not disturb the appointment.

UNDER the winding-up order in this case Vice-Chancellor *Stuart* had appointed Mr. *Tabor*, one of the creditors, and Mr. *James* an accountant, official liquidators; and a motion was now made on behalf of *Charles Cameron*, a contributory, and certain other contributories and creditors of the company, that the order of Vice-Chancellor *Stuart* might be discharged, and Mr. *D. Chadwick* appointed official liquidator.

Mr. *Daniel*, Q.C., and Mr. *L. Webb*, in support of the application, were stopped by Lord *Chelmsford*, L.C., who said that he thought he should best discharge his duty by peremptorily refusing to hear such an application in any case where the Vice-Chancellor in

L. C. 1866 *In re* International Contract Co.

the exercise of his discretion had appointed official liquidators; but his Lordship did not like to decide without hearing counsel, if counsel asserted that this was so strong a case as to take it out of the general rule.

Mr. *Daniel* then proceeded with the application, stating that the appointment was not supported by any other creditor, and that a very large body of creditors objected, and by sections 91 and 149 of the *Companies Act*, 1862, the Court is directed to have regard to the wishes of the creditors and contributories. The liquidators ought to be neither creditors nor shareholders: *In re Northumberland, &c., Bank* (1). Moreover, facts have been discovered since the appointment which shew it to be injudicious.

The *Attorney-General* (Sir *H. M. Cairns*), Mr. *Bacon*, Q.C., Mr. *J. N. Higgins*, Mr. *Roxburgh*, and Mr. *Swanston*, appeared for other parties, but were not heard.

Lord Chelmsford, L.C.:—

Here is a case in which the Vice-Chancellor has exercised his discretion. I cannot take any new facts into consideration. If there are such, or if the Vice-Chancellor has been deceived, and has made an improper appointment, you must apply to him to reconsider the case. This motion is refused with costs.

Solicitors concerned: Messrs. *Harrison & Lewis;* Mr. *W. Abraham;* Messrs. *Vallance & Vallance;* Mr. *W. Tatham;* Messrs. *Wilkinson & Co.*

(1) 2 De G. & J. 508.

In re LONDON, BOMBAY, AND MEDITERRANEAN BANK.

L. C. 1866 July 28.

Winding-up—Official Liquidator—Discretion—Appointment in Court.

Where a Judge in the exercise of his discretion has appointed an official liquidator, the Court of Appeal will not disturb the appointment.

The official liquidator may be appointed at the hearing of the Petition for winding-up.

THE Vice-Chancellor *Stuart*, at the hearing of the Petition for winding-up the *London, Bombay, and Mediterranean Bank, Limited*, had appointed two of the late directors to be official liquidators. No affidavit of fitness had been read, but no objection was taken at the time by any of the other parties, and the Petition was taken as unopposed. On the following day, an application was made to the Vice-Chancellor to reconsider the appointment of the official liquidators, and to hear the Petition as opposed, but the Vice-Chancellor refused to do so. This was a motion to discharge the order.

Mr. *Craig*, Q.C., and Mr. *Roxburgh*, for the motion:—

In this case it is alleged that the directors have been guilty of misconduct and have made away with no less than £197,000, and the appointment of a director and shareholder is highly improper. We appear for a large body of creditors and shareholders, and object. The appointment was made in the absence of evidence, and there cannot be said to have been judicial discretion exercised upon it, His Honour's attention not having been drawn to it. Moreover, it is irregular to appoint an official liquidator at the hearing of the Petition for winding-up. The case of *In re The Commercial Discount Company, Limited* (1), has been referred to, but the practice has been altered since that time, and the Master of the Rolls, before whom most of these applications are made now, always refuses to make the appointment at the hearing, and directs a reference to Chambers.

(1) 32 Beav. 198.

L. C. 1866 *In re* London, Bombay, and Mediterranean Bank.

The *Attorney-General* (Sir *H. M. Cairns*), Mr. *Daniel*, Q.C., Mr. *Bacon*, Q.C., Mr. *De L. Gifford*, Mr. *J. N. Higgins*, and Mr. *Whitehorne*, appeared, but were not heard.

Lord Chelmsford, L.C.:—

I really think that there is less ground, if possible, for this application, than for the previous one, *In re International Contract Company* (1), and the motion is dismissed with costs. All parties who have been served will have their costs.

Solicitors: Mr. *R. Miller*; Messrs. *Harrison & Lewis*.

L. C. 1866 *June* 23.

In re CHRIST CHURCH.

Jurisdiction—Queen—Visitor—Appropriation.

The Lord Chancellor, representing the Queen, as visitor of a college, on the Petition of the college sanctioned the appropriation of part of the revenues of the college to the augmentation of the stipend of a professorship which was on the same foundation as the college.

This was a Petition by the Dean and Chapter of the Cathedral Church of *Christ*, in *Oxford*, addressed to the Queen in her High Court of Chancery, Visitor of *Christ Church*.

The Petition stated that by a deed of dotation, dated the 1st of October, 1546, King *Henry* VIII. granted to the Dean and Chapter various estates, of the then value of about £2000 per annum, upon condition that the Dean and Chapter should covenant thereout (amongst other things) to pay yearly unto the readers of Divinity, Greek, and Hebrew, now called Regius Professors, the sum of £40. The payments required by the deed of dotation by no means exhausted the income of the estates comprised therein, and in the year 1595, an increase of rents having accrued, the Dean and Chapter appropriated part of such improved rents for the benefit of the students. In the year 1664 a benefaction of £900 from *William Thurston* was applied by the Dean and Chapter, under a decree of King *Charles* II., towards the foundation of an

(1) *Ante*, p. 523.

additional studentship, and the salaries of the lay clerks were increased. In the year 1605, a canonry in the chapter of *Christ Church* with the rectory of *Ewelme*, was, by command of King *James* I., annexed to the Regius Professorship of Divinity; and in the year 1630, another canonry in the same chapter was, by command of King *Charles* I., annexed to the Regius Professorship of Hebrew.

Under the provisions of the Act of 3 & 4 Vict c. 113, canonries in *Christ Church* were added to several of the Regius Professorships, but no provision was made for any additional endowment of the Regius Professorship of Greek.

The powers conferred by that Act upon the commissioners for increasing the emoluments of professorships having expired, and the revenues of the Dean and Chapter having largely increased, they proposed (although advised they were under no obligation to do so) to apply out of their appropriated income a sum sufficient to augment in perpetuity the endowment of the professorship to £500; and the Petition prayed that her Majesty, as visitor of *Christ Church, Oxford*, would be graciously pleased to signify her will and pleasure that the Dean and Chapter might so augment the endowment of the Professorship of Greek.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Bateman*, for the Petition.

LORD CRANWORTH, L.C.:—

This appears to be an extremely reasonable application. The two other professorships, that of Divinity and that of Hebrew, have been augmented, the one by a canonry and a valuable living, the other by a canonry. The study of Greek is an important and material element of education, and it is most desirable that a stipend larger than the very inadequate one of £40 per annum should be provided for the professorship. The present application is highly honourable to the Dean and Chapter, and not only receives my ready sanction, but also my hearty approval.

Solicitors: Messrs. *Janson, Cobb, & Pearson.*

L. C.
and L. JJ.

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August 8, 10.

In re OVEREND, GURNEY, AND CO.

GRISSELL'S CASE.

Company—Winding-up—Contributory also a Creditor—Calls—Set-off.

A shareholder in a limited company, who is also a creditor of the company under a contract, is not, in the event of the company being wound up, entitled to set-off the debt due to him against the calls, nor to set-off against the calls a dividend which may hereafter come to him. But upon payment of all calls which have become due, he is entitled to receive dividends at the same time and at the same rate with the other creditors.

THIS was an appeal motion by Mr. *Henry Grissell* to discharge two orders of Vice-Chancellor *Kindersley*.

Mr. *Grissell* was a holder of eighty shares in the company of £50 each, on each of which shares £15 had been paid up. He was a creditor of the company for £16,000 lent to the company on deposit with interest.

A resolution having been passed for the voluntary winding-up of the company, an order was made on the 22nd of June, 1866, for continuing it under the supervision of the Court.

The liquidators had made a call of £10 per share, and it was expected at the time of this application that they would shortly be able to pay a dividend of 4*s.* or 5*s.* in the pound on the debts of the company. Being advised that there was great doubt as to the rights of those creditors who were also shareholders, they informed Mr. *Grissell* that they should refuse to pay the creditors who were shareholders any dividend on their debts until the other creditors had all been paid in full.

Mr. *Grissell* accordingly took out a summons, asking that the liquidators might be ordered, upon any dividend being paid by them to the creditors, to pay to the applicant a dividend at the same rate upon the balance of the amount owing to him by the company for money lent by him to them, with interest at the rate agreed upon between them, after deducting from such debt and interest the amount of any call that should have been made on the shares held by him. Vice-Chancellor *Kindersley* dismissed this summons.

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Subsequently Mr. *Grissell* took out another summons, asking that the liquidators might be ordered upon any dividend being paid by them to the creditors, to pay to him a dividend at the same rate upon the amount of his debt and interest, deducting from such dividend the amount of any call that should have been made on the shares held by him, and should not have been paid.

This summons also was dismissed by Vice-Chancellor *Kindersley*. His Honour said that a company was only a large partnership, modified in many important particulars by special enactment, but still in essence a partnership; and that where the statute did not expressly or impliedly vary the principles to be applied, those principles which applied to an ordinary partnership were applicable to a company. One of the principles of the law of partnership was, that none of the partners could claim any debt owing to him from the partnership estate till all the creditors who were not partners had been paid in full. His Honour expressed some doubt whether the *Companies Act*, 1862, did not contain provisions preventing the application of this principle to companies; but upon the whole, looking especially at the 101st section of the Act, and the circumstance that the Act did not contain any provision answering to sect. 17 of 21 & 22 Vict. c. 60, which it repealed, His Honour thought that Mr. *Grissell* was not entitled to any such set-off as he claimed.

Sir *Roundell Palmer*, Q.C., and Mr. *Wickham*, for the appeal motion:—

The consequences of the principles laid down by the Vice-Chancellor are, that the limit of the liability of the shareholders in a limited company is enlarged by confiscating their deposits, and that they are practically placed in the position of shareholders in a company limited by guarantee. The Vice-Chancellor went on the principle that the law of partnership is to be applied, except so far as the Act excludes it, and he thought that the Act did not exclude the rule that a partner can receive nothing out of the assets till all outside creditors are paid, and His Honour said he was confirmed in his view by the circumstance that 21 & 22 Vict. c. 60, s. 17, which would have settled the present question in favour of the Appellant had been repealed without the substitution

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of any analogous provision. We submit that the Vice-Chancellor took an erroneous view of the Act 25 & 26 Vict. c. 89, as a whole. These companies under the Act are corporations; the members are not partners, and you cannot import the law of partnership any further than the Act expressly imports it. The exclusion of partnership rules by express words is unnecessary, for the very fact of incorporation excludes them. A partner cannot, in the ordinary sense of the term, be a legal creditor of his co-partners, but an incorporated company is a distinct person in law, and any individual member of it may be its legal creditor, and acquires by contracts with it the same rights as a stranger would do. A creditor of the company is in no sense a creditor of the individual members, he has no remedies against them except through the machinery which the Act gives for working out the rights of the company against its members by means of a winding-up. By sects. 6 and 18 of the Act the company is a corporation, "but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereafter mentioned." Under 7 & 8 Vict. c. 110, s. 66, if satisfaction could not be obtained out of the assets of a company execution might be taken out against a shareholder, and this continued to be the state of the law until the first limited liability Act, 18 & 19 Vict. c. 133, which proceeded on the same plan, but limited the liability of the member under the execution so taken out. The 19 & 20 Vict. c. 47 (the *Companies Act*, 1856), contained no such provision, and gave the creditor no remedy against the members except through a winding-up. The Act of 1862 is similar in its effect. The Vice-Chancellor felt that the 38th section, which defines the liability of members, was in the way of his decision. The 4th clause of that section limits the liability of a member to the amount unpaid on his shares. The 7th provides that nothing due to a member, in his character of member, shall come into competition with debts to outside creditors, plainly shewing that all debts due to members otherwise than as members were left to the rule of law. The Vice-Chancellor would have decided with us on this ground had he not thought that this clause was over-ridden by a later section. The decision, in fact, substitutes for the words "in his character of member," the words "on any account whatsoever." Suppose a company

limited by shares, which had been fully paid up, a holder of a single share to whom the company owed £10,000 could never receive a farthing till all the outside creditors were paid, a period which would never arrive. Section 70 shews how completely the results of incorporation are assumed in the Act. When we come to the winding-up provisions, section 80 gives us a test of insolvency. Can it be doubted that Mr. *Grissell* could have sued the company at law for his deposit. If he is a creditor for that purpose why not for others? The 98th section directs the assets to be applied in discharge of the liabilities, not defining them, but leaving the matter as it stood on section 38. Section 101, on which the Vice-Chancellor relied, relates solely to set-off, and supposing it to defeat the right of set-off which the Appellant claims, it cannot affect the question whether he is entitled to be paid a dividend along with other creditors. Section 107 again treats of creditors without referring to whether they are shareholders or not. By section 133, under a voluntary winding-up, all liabilities are to be paid *pari passu*, and by section 158 all debts are proveable. How is the Appellant's debt to be taken out of this provision? The Vice-Chancellor laid great stress on the non-repetition in this Act of sect. 17 of 21 & 22 Vict. c. 60, but considering that section 176 of this Act makes its provisions apply to existing companies, it cannot be supposed that the Legislature considered the omission to have such an effect, as it would not thus, *ex post facto*, alter in so serious a degree the right of shareholders in existing companies. The cases of *Steward* v. *Greaves* (1), and *Barker* v. *Buttress* (2), shew that even under 7 Geo. 4, c. 46, creditors of a banking company had not their common law remedy against the shareholders, and if the law of partnership was made inapplicable by that Act, *à fortiori* it is so by an Act which produces complete incorporation. A corporation is quite a different thing from an assemblage of its members: *Society of Practical Knowledge* v. *Abbott* (3). We submit, therefore, that if the Appellant is entitled to nothing more, he is at all events entitled, on paying his calls, to receive dividends at the same time with, and at the same rate as the other creditors.

But we say that the Appellant is entitled to a set-off. The Act 7 & 8 Vict. c. 110, applied the law of bankruptcy to joint

(1) 10 M. & W. 711. (2) 7 Beav. 134. (3) 2 Beav. 559.

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stock companies, and sections 8 and 9, clearly recognise the right of a member to set-off all claims which he has against the company except such as he has in the character of a member. Under the *Winding-up Act* of 1848, 11 & 12 Vict. c. 45, ss. 61, 86, the right of set-off is expressly recognised. The Act of 1856, 19 & 20 Vict. c. 47, does not re-enact any of those clauses, but section 90 assumes the doctrine by speaking of balances. The Act 21 & 22 Vict. c. 60, s. 17, expressly provides for set-off. The present Act is not so explicit, but the 34th and 48th of the Orders of 11th of November, 1862, made under it, recognise the principle. It was unnecessary to insert express provisions as to set-off, the general law of the land providing for the case. There was set-off in bankruptcy before the statute 2 Geo. 2, c. 22: *Christ.* Bank. Law (1); *Ex parte Prescot* (2). The cases of *Garnet and Moseley Gold Mining Company* v. *Sutton* (3), and *Ex parte Barrett* (4), are strong in favour of set-off in a case like the present. As to the 101st clause, it gives a right of set-off in some cases, which is expressed in wider terms than those of the statute of set-off, but applies only to unlimited companies. It contains no negative words, and takes away no right of set-off existing independently of the express provisions of the Act.

Mr. *James Kaye*, for some creditors who were not shareholders, stated that his clients did not oppose the appeal.

Mr. *Baily*, Q.C., and Mr. *Roxburgh*, for the official liquidator:—

The plain meaning of section 101 is, that in a limited company there shall be no set-off. This is just and reasonable. A creditor before advancing money to the company, would probably inspect the register, and if he found a man of known substance, like Mr. *Grissell*, holder of a number of shares, on which very little was paid up, he would consider himself safe; but this would be a snare if all the unpaid calls could be retained to meet a debt due from the company to Mr. *Grissell*, of which the person searching could know nothing. The 101st section negatives set-off altogether; in a limited company, according to that section, a shareholder could not set-off a debt due from the company to him, against a debt due

(1) Vol. i. 2nd ed. 499.
(2) 1 Atk. 230.
(3) 3 B. & S. 321.
(4) 13 W. R. 559.

from him to the company, nor *à fortiori* against calls. The result of allowing a set-off would be most mischievous. To test the principle by an extreme case, suppose that each shareholder in a limited company is a creditor to the company, to an amount exactly equal to the amount not paid up on his shares. If set-off is allowed they are all paid their debts in full, while the outside creditors get nothing; it comes to the same thing as if they paid up all their calls, and then the amount, instead of being divided among all the creditors, were divided among the creditor shareholders only. The case of *Garnet and Moseley Gold Mining Company* v. *Sutton* (1), was decided under a clause which has been since repealed. We submit that the Vice-Chancellor rightly refused a set-off, and that Mr. *Grissell* ought not to receive anything till he has paid up his shares in full, or, at any rate, till he has paid all calls due from him.

Sir *R. Palmer*, in reply.

Aug. 10. LORD CHELMSFORD, L.C.:—

This is a motion by way of appeal against two orders of Vice-Chancellor *Kindersley*, one order made upon the 1st of August, dismissing an application by Mr. *Henry Grissell*, a shareholder of the company of *Overend, Gurney & Co., Limited*, that the liquidators might be ordered to pay him a dividend upon the balance of the amount owing to him by the company for money lent by him to them, after deducting from such debt the amount of any call that should have been made on the shares held by him in the company; and another order, made on the 2nd of August, dismissing a similar application by Mr. *Grissell*, that the liquidators might be ordered to pay him a dividend upon the amount owing to him by the company, deducting from such dividend the amount of any call that should have been made upon the shares held by him, and should not have been paid. The difference between the two applications is this: in the first it was asked that the dividend might be paid upon the balance after deducting the call; and in the second, that the dividend might be calculated upon the entire

(1) 3 B. & S. 321. 9 Jur. N.S. 542.

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debt due from the company, and then the amount of the call be deducted from the dividend.

Both applications may be regarded as raising the question whether a shareholder, who is also a creditor of a limited liability company, is entitled either to set-off, or to have credit for, so much of his debt as is equal to the amount of calls which have been made upon, but not paid by, him, and to receive a dividend for the balance.

The question depends entirely upon the construction of the *Companies Act,* 1862; for though it was made an argument whether companies were or were not like ordinary partnerships, whichever way such a question may be decided, where a company is being wound up the rights and liabilities of the company and its shareholders must be regulated by the provisions of the Act.

In considering the questions involved in these applications, the primary intention of the Legislature in the provisions relating to the winding-up of companies must be regarded. That intention is expressed in the 133rd section of the Act, being that "the property of the company shall be applied in satisfaction of its liabilities *pari passu,* and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Bearing this in mind, two questions arise for determination upon these applications: 1st, whether a member of a company, who is also a creditor, is entitled to be paid his debt *pari passu* with the other creditors, who are not members of the company, or only after the debts due to these creditors have all been paid; and 2ndly, if such a member is entitled to be paid in common with the other creditors, how are calls which are made upon him as a contributory to be dealt with?

Ought he to pay the full amount remaining unpaid upon his shares before receiving any dividend in respect of the debt due to him?

Or ought he, before receiving payment of any dividend, to pay up any calls that may have been made upon his shares?

Or is he entitled to deduct the amount of calls which have been made upon, but not paid by him, from the debt which is due to him, and receive a dividend upon the balance?

As to the first question: the *Companies Act*, 1862, appears to make no distinction between a creditor who is a member of the company and one who is not. There is nothing to be found in it to limit the meaning of the general word "creditors." On the contrary, the Act in various parts of it recognises members of the company as creditors. It will be sufficient to refer for proof of this to the 7th qualification in the 38th section, and to the 101st section. The Act would be a complete snare upon members of companies who are creditors if they were to be postponed to other creditors who are not members.

Members of companies being then entitled to satisfaction of their debts *pari passu* with the rest of the creditors, the second question which I have stated arises—How are the calls made upon them to be dealt with?

In the first place, I think that they cannot be required to pay up the full amount remaining unpaid upon their shares. The 75th section of the Act enacts, that the liability of any person to contribute to the assets of a company, in the event of its being wound up, "shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." Until the call is made, there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue due till a call is made. The power to make calls is only to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes, and it might be that a contributory thus paying in advance might lose all that he had so paid in the event of any of his co-contributories becoming insolvent.

The two remaining questions may be considered together. It appears to me to be quite clear that the amount of the call not paid cannot be set-off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the

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rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to the 133rd section as to the satisfaction of the liabilities of the company *pari passu*. And the argument against the allowance of a set-off, addressed to the Court on behalf of the official liquidators, is extremely strong—that if a debt due from the company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid twenty shillings in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all.

The case of a member of a limited company is different from that of a member of a company of unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid —evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and, therefore, it signifies nothing to the creditors whether a set-off is allowed or not. But with respect to a member of a company with limited liability, if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts.

But if the amount of an unpaid call cannot be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows in the last place, that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be of course upon the whole debt, and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made, or,

having been made, when he has paid the amount of it. I am therefore of opinion that the orders of Vice-Chancellor *Kindersley* are right, though not exactly upon the grounds upon which His Honour has been represented to have proceeded. I think the present motions must be dismissed; but, considering the general interest in the question, and the importance of having an authoritative decision upon it, the costs of all parties ought to be paid by the liquidators out of the estate.

I may add, that the Lord Justice *Turner*, who remained in town for the purpose of assisting in the hearing of the case, concurs in this judgment.

SIR J. L. KNIGHT BRUCE, L.J.:—I also concur.

Solicitors for Mr. *Grissell:* Messrs. *Bircham, Dalrymple, Drake, & Co.*

Solicitors for the Official Liquidators: Messrs. *Young, Jones, & Co.*

Solicitors for Creditors who were not Shareholders: Messrs. *Maynard, Son, & Co.*

L. JJ.

1866

July 12.
August 9.

In re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST.

SMITH, FLEMING, & Co.'s CASE.

GLEDSTANES & Co.'s CASE.

Companies Act, 1862, s. 95—*Winding-up—Negotiation of Bills by Official Liquidator—Set-off—Practice.*

The principles on which the Court acts under section 95 of the *Companies Act*, 1862, considered.

At the time when an order was made for winding up a company, the company was the holder of bills accepted by *S. & Co.* which would become payable in six months. At the same time *S. & Co.* were holders of bills drawn by the company, which the drawees, shortly before the winding-up order, had refused to accept:—

Held, reversing the decision of the Master of the Rolls, that *S. & Co.* had no right to set-off against each other the present liability of the company under their dishonoured bills and the future liability of *S. & Co.* under their acceptances, nor any right to have the bills retained by the official liquidator, until a right of set-off arose, but that the official liquidator ought to be allowed to negotiate the bills accepted by *S. & Co.*

Whether there was jurisdiction under the Act (without bill) to entertain an application by *S. & Co.* to restrain the official liquidator from negotiating their bills—*Quære.*

THIS was an appeal by the official liquidator of the *Commercial Bank Corporation of India and the East* from a decision of the Master of the Rolls, who had made an order restraining him from negotiating certain bills of exchange.

The company was a banking company, having its head office in *London*, and branches at *Bombay*, *Calcutta*, and other places in the East.

Messrs. *Smith, Fleming, & Co.* were the indorsees and holders of four bills of exchange, for sums amounting in the whole to £6,200, drawn at *Bombay* by the company on the *London Joint Stock Bank*, and payable six months after sight. These bills, all of which were dated the 28th of April, 1866, arrived in *London* on the 23rd of May, 1866, and upon their arrival were presented at the *London Joint Stock Bank*, and were refused acceptance, with the answer

"refer to drawers." They were then presented at the head office of the company for acceptance, which was refused, and they were duly noted.

The company, on the other hand, were the indorsees and holders of two other bills of exchange for sums amounting in the whole to £5,155 9*s.* 8*d.*, drawn at *Calcutta* by *Mackinnon, Mackenzie, & Co.* on *Smith, Fleming, & Co.*, and also payable six months after sight. These bills, which were dated respectively the 17th and 20th of April, 1866, also arrived in *London* on the 23rd of May, 1866. There were shipping documents attached to each of them, and each bill expressed on the face of it that the shipping documents were attached as security for acceptance only. On these bills being presented to *Smith, Fleming, & Co.* for acceptance on the 23rd of May, they retained the shipping documents and accepted the bills. The bills would become due on the 26th of November, 1866.

On the 17th of May, 1866, before any of the above-mentioned bills arrived in *London*, a petition had been presented to wind-up the company, and on the 28th of May, 1866, an order was made to wind it up, but the official liquidator was not appointed until the 4th of June, 1866.

On the 29th of May, 1866, the Master of the Rolls, upon the application of Messrs. *Smith, Fleming, & Co.*, made an *ex parte* order in the matter restraining the company from parting with the two bills of exchange which *Smith, Fleming, & Co.* had accepted, until the further order of the Court. The official liquidator, on the 15th of June, took out a summons at Chambers for leave to move to discharge the restraining order, and also a summons for leave to negotiate the bills. Leave to move was given, but the other application was directed to stand over to await the result of the motion to discharge. A motion was accordingly made on the part of the official liquidator to discharge the restraining order, but the Master of the Rolls by a further order, dated the 21st of June, 1866, refused to discharge it, and ordered that the official liquidator should not negotiate the bills (1). The official liquidator

(1) The judgment of the Master of the Rolls (June 20) was as follows:—

"I deferred expressing my opinion till to-day, not because I entertained much doubt upon the question itself, but because I thought it required careful consideration with respect to the mode in which the Court should deal

(12 Jur. N. S. 758.)

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thereupon brought this appeal by a notice of motion, asking that the order of the 21st of June might be varied by ordering that the

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with cases of this description, this being a case which must necessarily very frequently arise, and one in which it is very desirable to lay down a rule, both as to the course which the Court should adopt, and the mode in which it should be arrived at.

"Now, I have come to the conclusion, that the official liquidator, or rather the Court, which, in fact, conducts the whole matter, being in the nature of a trustee for all parties, it is not justifiable in the Court to take any proceedings which will give an advantage to one set of *cestuis que trust* over another, and that this is a necessary and fundamental principle of equity in all these winding-up cases.

"In the case before me, it is certain that *Smith, Fleming, & Co.* were creditors of the *Commercial Bank* at the time when they accepted these bills; it is also certain that if the bills remained in the hands of the *Commercial Bank* until they were due, *Smith, Fleming, & Co.* would be entitled to set off one debt against the other. The object of this motion is to allow the official liquidator to discount these bills, and to enable a third person, who will be a stranger to these parties, to do that which the *Commercial Bank* could not themselves do. I am of opinion that that is not a proper course for the Court to adopt; that, as I have said before on various occasions, 'as the tree falls so it must lie,' and that the right of the parties must be determined as they stand, whether they are worked out or become matured by effluxion of time, and that it is the duty of the Court not to interfere so as to give one set of persons an advantage over another. The usual rule of the Court is, that bills in the hands of the official liquidator remain in his hands until maturity, when they are presented, there being generally a loss, when they are good bills (and it would be the same if they were not), if they are discounted. There may be occasionally instances where it would not affect the rights of the various shareholders and creditors as between themselves, in which the Court might negotiate bills, but those cases must be rare. I am of opinion that the fact that the negotiation of these bills will give an advantage to one set of creditors over another, so far from being a reason for negotiating the bills, is a reason against it, and that the Court ought not to sanction it.

"I now express my opinion as to the course that will always be adopted by me in these matters; but I doubt very much whether the proper course of proceeding is for the person who wishes to enforce this equity to apply to the Court for the purpose. It is quite clear he might file a bill, and I doubt whether the proper course is to make such an application as was made in this case. I understood that the official liquidator waived any objection to the form of proceeding; but I think that the proper form of proceeding in future would be this, which I apprehend is now the law and practice of the Court, that the official liquidator should not be able to negotiate any bills without the leave of the Judge in Chambers, that he must apply for that purpose, and that when anybody who is either a shareholder or a creditor—that is to say, one of the persons for whom the official liquidator is in the situation of what I may call a *quasi* trustee—is likely to be prejudiced, he should give

order of the 29th of May, 1866, should be discharged, or that it might be otherwise varied as the Court should think fit.

Along with the above case came on that of Messrs. *Gledstanes & Co.*, which was precisely similar in character, except that no shipping documents were sent to them along with the bill which they accepted.

Mr. *Selwyn*, Q.C., Mr. *G. M. Giffard*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

We submit, first of all, that there is no jurisdiction to make such an order as the present. It is the duty of the official liquidator to get in the assets in the way most advantageous to the estate, and if there is any equity against his dealing with any particular security, such equity ought to be enforced by bill. But we say that if there was jurisdiction, the order is wrong on the merits. These were negotiable instruments sent for the purpose of being negotiated, the acceptor has no equity to have them kept in hand. There is no present debt from either of the Respondents, and there can be no set-off either at law or equity between a present debt and a future liability. The Act contains no provision as to mutual debts and credits like that in the *Bankruptcy Act*. The argument of the other side cannot stop short of this, that a person who owed money to the company might buy their bills in the market and

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that person notice to shew cause why the Court should not give leave to negotiate the bills. If the person to whom such notice is given does not choose to come in, that is his own fault; if he chooses to come in, then the Court can determine the question between the parties in Chambers, or, if necessary, have it adjourned into Court. I can well conceive that new phases will occur in these winding-up cases, and that new questions may arise, which we have not yet had brought before the Court. I think it exceedingly probable that a great number of difficult questions may arise, and I think that what I have stated is the proper mode in which such questions should be raised. I wish to express that opinion publicly. I think it is the cheapest mode and the proper mode with regard to the practice of the Court, and that it is not open to any objection.

"On the present occasion I shall make no order, further than to direct the official liquidator not to negotiate the bills. The costs of both parties must come out of the estate, as I think that I should have so held if the official liquidator had applied for leave to negotiate the bills, and had given the Respondents notice, and they had come before me to oppose the application, and had established their case."

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set them off. The duties of the official liquidator are to be exercised with a view to the benefit of the estate and the creditors generally; here he has been restrained in order that a particular creditor may receive a benefit. [*In re London Cotton Company* (1) was referred to.]

Mr. *Bacon*, Q.C., for *Smith, Fleming, & Co.*, Mr. *De Gex*, Q.C., for *Gledstanes & Co.*, and Mr. *Druce*, with them for both firms:—

We submit that the jurisdiction is clear, for under the 95th section it is plain that the liquidator cannot endorse bills without the sanction of the Court. It is not a matter of course that this sanction should be given, for an indorser incurs a liability as surety, and it is not the ordinary course of business to endorse bills, but to keep them till maturity. It has been contended that the rules in bankruptcy as to mutual credit are not to be extended to winding-up without any statutory enactment for that purpose; but the principle of mutual credits was not founded on the Bankrupt Acts. Those Acts only gave to the assignees a power in this respect which the commissioners had before (2). The equity was anterior to the statutes: *Ex parte Blagden* (3); *Freeman* v. *Lomas* (4). It is not necessary, however, to rely on this. In a few weeks there will be a clear right to set-off if things remain as they are. It is not alleged that there is any necessity to endorse these bills. The object of endorsing them is to prevent the set-off from arising. The principle of the Master of the Rolls is, we submit, sound—to leave the rights of the parties as they stood at the date of the winding-up order. Moreover, we may waive the six months' delay of payment, which was for our benefit, so the matter stands as if both debts were payable now. The Appellant says that a negotiable instrument was meant to be negotiated; but that only comes to this, that the rules as to negotiable instruments enable the holder to effect what is analogous to a sale for valuable consideration without notice, so as to defeat the equitable right of a third party—a scheme which the Court will not help.

(1) Law Rep. 2 Eq. 53.
(2) Christ. Bank. Law, i. 500.
(3) 19 Ves. 465.
(4) 9 Hare, 109.

If we had given a bond instead of accepting bills, our set-off could not have been prevented, and the Court will not take advantage of the nature of negotiable instruments to prevent it.

Mr. *Selwyn*, in reply :—

It is not necessary to shew a special case for endorsing a particular bill. The general scope of the Act is, that the assets should be realised as soon as convenient for the purpose of paying creditors, and that creates a sufficient necessity unless some case is made shewing the inexpediency of negotiating some particular acceptances.

August 9. SIR G. J. TURNER, L.J., after stating the facts, continued :—

This case depends, as it seems to me, wholly upon the operation of the *Companies Act*, 1862; for there is not, as I apprehend, any right on the part of Messrs. *Smith, Fleming, & Co.*, either at law or in equity, to set-off against their future liability upon the bills accepted by them, the present liability of the company to them upon the company's dishonoured acceptances. Nor do I see any ground, independently of the statute, upon which Messrs. *Smith, Fleming, & Co.*, can be entitled to insist upon their acceptances being retained and held by the company until they shall become due, in order that the right of set-off, which would then arise, may be made available to them. As to any present right of set-off, there is, on the one side, a debt presently due, and on the other, a liability which will accrue due at a future date; and the debt cannot, as I apprehend, be set-off at law against the liability, nor can it, as I think, be so set-off in equity. The right of set-off may, indeed, as was insisted in argument, have subsisted in equity before it was introduced into the law by statute; but no authority was cited in argument, and none, so far as I am aware, can be found, in which the right was ever held to exist in equity in such a case as the present; and set-off in bankruptcy does not, I think, apply. Where the law of bankruptcy was intended to be applied, it is specially referred to by the Act. To hold that the right of set-off exists in such a case as the present, would, as it seems

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to me, be in effect to alter the contracts between the parties. As to any right, independently of the statute, to insist on the acceptances being retained, I can see no foundation on which it can rest. There is not, as it seems to me, either contract or obligation to support it. I am much confirmed in the opinion that the case depends wholly upon the statute, by the Master of the Rolls having so dealt with it throughout.

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Taking, then, the case to depend upon the operation of the statute, the material section to be considered appears to me to be the 95th section. By the 94th section of the Act it is enacted, that the official liquidator shall take into his custody, or under his control, all the property, effects, and things in action to which the company is entitled; and shall perform such duties in reference to the winding-up of the company as may be imposed by the Court. And by the 95th section of the Act power is given to the official liquidator, with the sanction of the Court, to do a variety of things specified in the section, and, amongst others, to which I shall presently advert, to endorse any bill of exchange or promissory note in the name and on behalf of the company. There can be no doubt, therefore, that an official liquidator is not authorized to endorse bills without the sanction of the Court. But then comes the question, which appears to me to be the real question on which this case must depend, by what principles the Court is to be guided in granting or withholding this sanction. It cannot, of course, be supposed to have been intended that the Court should exercise a mere arbitrary discretion in this respect, that it should grant or withhold its sanction at its mere will and pleasure. But yet the Act is silent as to the circumstances under which the sanction is to be granted or withheld. There is nothing which I can find which can determine this question, except the context of the Act; and I think, therefore, that it is to the context of the Act we must look for determining it.

Looking, then, to the context of the Act, it is to be observed, in the first place, that almost all, if not all, the other cases specified in this section, in which the sanction of the Court is required to the proceedings of the official liquidator, are cases in which his proceedings might involve the estate in expense or litigation. And it is, therefore, reasonable to suppose that in this particular

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case of endorsing bills, the Court was intended to be guided by the same consideration—in effect, that this section was intended to operate as a check upon any proceedings of the liquidator which might operate to the prejudice of the estate. I may add, that the Legislature would, of course, trust the Court not to sanction anything which would be improper, or contrary to the ordinary course of trade. Here, therefore, is one principle by which, as I think, the Court ought to be guided in the exercise of this discretion; and another principle is, I think, to be deduced from the general purposes of the Act. The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and amongst the creditors *pari passu;* and this discretion of the Court ought, therefore, as I think, to be exercised, not for the benefit of any particular creditor or creditors, but for the benefit of the general body of creditors interested under the Act.

Applying then these principles to the case before us, would there be any prejudice to the estate by the official liquidator endorsing these bills? I cannot see that there would, there not being, as I think, any legal or equitable right on the part of Messrs. *Smith & Fleming* to stop the negotiation of them; and although, as observed by the Master of the Rolls, there may be loss by the discount of the bills, there would, on the other hand, be gain by stopping the interest on the debts, which would be paid by means of the bills being discounted.

Would there then be anything improper, or contrary to the ordinary course of trade, in these bills being discounted? I cannot think that there would, and, at all events, there is nothing before us to shew that this would be the case. In order to test this point, suppose the case of a winding-up under an inspectorship deed not governed by the law of bankruptcy, and of money being wanted for the payment of debts, surely it could not be said that the inspectors would be acting improperly, or contrary to the course of trade, in endorsing bills.

Then, again, it must be considered how the restraint upon the endorsement of these bills will operate, and it seems to me that it will operate for the benefit of Messrs. *Smith, Fleming, & Co.*, and to the prejudice of the rest of the creditors of the company, for

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if the bills remain unendorsed, Messrs. *Smith, Fleming, & Co.*, will, in effect, obtain payment in full, *pro tanto*, of what is due to them, as soon as the bills become due, though there may not at that time have been sufficient assets of the company collected for the payment of any part of what is due to the other creditors of the company: and not only so, but *Smith, Fleming, & Co.* will obtain payment as above, notwithstanding it may ultimately turn out that, from the deficiency of assets of the company, and from the contributories not being able to answer their liabilities, there may not be funds sufficient for the payment of the other creditors. There is in this particular case less ground for restraining the discount of these bills, from Messrs. *Smith, Fleming, & Co.* having retained the shipping documents; and the view which I have taken as to the course which the Court ought to take in granting or withholding its sanction to the endorsement of bills is, in my opinion, much confirmed by the circumstances that the mutual credit clause, which is contained in the Bankruptcy Acts, is not imported into this Act, although other provisions of the *Bankruptcy Act* are so imported; and also by the circumstance that, by the 98th clause of the Act, the first duty imposed upon the Court is to cause the assets of the company to be collected and applied in discharge of its liabilities.

Some question was raised in the course of the argument before us, whether the order in question could properly be made in the matter of the Act; but, as my opinion is against the order on the merits of the case, I do not enter into that question. I desire, however, not to be understood as intimating any opinion in favour of the jurisdiction.

Upon the whole, I think that the proper order to be made upon this motion is to discharge both the orders of the 29th of May and the 21st of June; and if the official liquidator's summons of the 15th of June was before the Master of the Rolls when the order of the 21st of June was made, to give liberty to the official liquidator to discount or sell the bills; but if the above summons was not before the Master of the Rolls on the 21st of June, then to give him liberty to make a further application to the Master of the Rolls for leave to endorse the bills. The costs of all parties, of both the orders, and of the appeal, should, I think, come

out of the estate. There will be a similar order in *Gledstanes'* case.

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SIR J. L. KNIGHT BRUCE, L.J., concurred.

Solicitors for the Official Liquidator: Messrs. *Freshfields & Newman.*

Solicitors for *Smith, Fleming, & Co.:* Messrs. *Murray, Son, & Hutchins.*

In re NATIONAL SAVINGS BANK ASSOCIATION.

Companies Act, 1862—*Winding-up—Petitioner—Costs.*

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A fully paid-up shareholder in a limited company can present a Petition under the *Companies Act*, 1862, for winding-up the company. Order of the Master of the Rolls affirmed.

Where a Petition, presented by a company to discharge a winding-up order, was dismissed, the form of the order was to direct the costs of the Respondents to come out of the estate, and make no order as to the costs of the company.

THIS was a Petition of appeal to discharge a winding-up order made by the Master of the Rolls.

The *National Savings Bank Association, Limited,* was duly registered on the 17th of July, 1856, as a limited company, under the *Joint Stock Companies Act*, 1856, and became subject to the provisions of the *Companies Act*, 1862. The nominal capital was £100,000, in shares of £1 each, of which 30,869 only had been issued, on which £16,178 only had been paid. The company carried on business until the 9th of June, 1866, when the principal office was closed, and soon afterwards the branches were also closed. Some informal resolutions had been passed at a meeting at *Birmingham*, for winding up the company voluntarily, when *Frederick Calrow*, the holder of fifty *fully paid-up* shares in the company, presented his Petition, stating that there were difficulties in the way of a voluntary winding-up, and praying for the usual winding-up order to be made by the Court. This Petition was supported by a large number of shareholders, and was opposed by the directors and other shareholders.

The Petition came on to be heard before the Master of the Rolls,

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who, on the 7th of July, 1866, made the usual order for winding up the company.

The company now presented a Petition of appeal, praying that this order might be discharged:—

Mr. *Selwyn*, Q.C., and Mr. *Cottrell*, in support of the appeal:—

When a contributory petitions, the Court will have regard to the wishes of the shareholders, and will not, in a case like the present, disregard the determination of the shareholders in favour of a voluntary winding-up. But we say that the Petitioner has no *locus standi* at all, not being a contributory within the meaning of the Act, as his shares are fully paid up: *In re Patent Artificial Stone Company* (1). It is impossible to bring a holder of fully paid-up shares in a limited company within the definition of a contributory in sect. 74 of the Act.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, in support of the order:—

Vice-Chancellor *Wood*, *In re Anglesea Colliery Company* (2), held, that on the true construction of the Act "contributory" includes all shareholders. The rights of parties cannot be fairly adjusted unless all shareholders are parties to the proceedings. Liability to contribute is not the same as liability to make further payments. If some shareholders in a limited company have paid up in full, others not, and it is not necessary to call up all the unpaid portion of their shares of the capital to pay the debts, the paid-up shareholders are persons who are liable to contribute, but have contributed more than they were liable to. They come under the description of persons liable to contribute, though not liable to make further contributions. *Re British and Foreign Cork Company* (3) was also referred to.

Mr. *Cottrell* in reply:—

The argument on the other side is, that "member" is the same as "contributory;" but the Act says that a contributory is a person who may have to contribute, and provides that creditors or

(1) 34 Beav. 185; 11 Jur. (N. S.) 4.
(2) Law Rep. 2 Eq. 379, and 1 Ch. 555.
(3) 11 Jur. (N. S.) 941.

contributories may petition. If the word contributory means the same as member, why was it invented? It never could have been intended that those who had nothing to pay, and no interest in the matter, should be able to interfere. In sect. 109, it is said that the Court shall distribute the surplus among the "parties entitled thereto,"—not the contributories—shewing a clear distinction. Every shareholder, whether a contributory or not, can go into Chambers and secure his rights, but the Act is only for the relief of creditors who have to receive, or contributories who have to pay. Why could not time have been allowed to hold the proper meetings, and have a voluntary winding-up, instead of hurrying to present this Petition?

SIR J. L. KNIGHT BRUCE, L.J.:—

It seems to me that the order of the Master of the Rolls proceeded on a correct interpretation of the word "contributory," as used in the Act of Parliament for the purpose for which it is brought under our notice. The order, as made by him, was *ex debito justitiæ*, and clearly right, and the present Petition of appeal is without any foundation whatever.

SIR G. J. TURNER, L.J.:—

I am entirely of the same opinion.

Three questions are raised—first, Whether the Petitioner is a contributory entitled to present the Petition? secondly, Whether there is, or is not, any resolution in force for the voluntary winding up of the company? and, thirdly, Whether the wishes of the shareholders should be consulted on this question?

As to the first question, whether the Petitioner is or is not a contributory, some argument has been addressed to us, that the word "contributory" may have one meaning in one part of the *Companies Act*, 1862, and another meaning in another part of the Act. It is said that it is one question whether this gentleman may, or may not, be a contributory for the purpose of receiving back anything coming from the company; and that it is a different question whether he is a contributory for the purpose of petitioning to wind up the company. I do not consider that it would be at all

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consistent with the law, or with the course of this Court, to put a different construction upon the same word in different parts of an Act of Parliament, without finding some very clear reason for doing so; and having looked through this Act of Parliament many times, and with as much care as I have been able to bestow upon it, I am quite satisfied that no sufficient reason can be assigned for construing the word "contributory" in one part of the Act in a different sense from that which it bears in another part of the Act.

Then the question on this part of the case is, whether a shareholder, who has paid up the full amount of his shares, is or is not a contributory within the meaning of this Act of Parliament? The same question arose in the *Anglesea Colliery Case* (1). The question arises thus:—In the 133rd section of the Act we find these provisions, under the head of "Voluntary Winding-up." "The following consequences shall ensue upon the voluntary winding up of the company." First,—"The property of the company shall be applied in satisfaction of its liabilities, *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company," using there the word "members;" clearly, therefore, "members" are persons who have a right and an interest in the distribution of the assets of the company. Then the 9th and 10th articles of this 133rd clause run thus:—The 9th is, "the liquidators may at any time after the passing of the resolution for winding up the company"—this is for voluntary winding up, but there are similar provisions for a compulsory winding-up—"and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves." The 10th Article is: "The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves." Surely, it is rather a strong view of

(1) Law Rep. 2 Eq. 379, and 1 Ch. 555.

this Act of Parliament to say that "contributories" does not include persons who have paid up their shares in full, but that it includes only persons who have made partial payments upon their shares. It is very difficult to suppose that the Legislature could intend that the liquidators might make calls for the adjustment of the rights of the contributories amongst themselves, construing the word "contributories" to mean only those members of the company who have not paid up the full amount of their shares. We may, indeed, be driven to this construction; but, before we are driven to it, we must look at the 74th section, on which the question really arises. This section says, "The term 'contributory' shall mean every person liable to contribute to the assets of the company under this Act." It is said that a person who has paid up his shares in full in a limited company, as this is, is under no liability to contribute, and therefore is not a contributory within the meaning of this section; but in this argument the last three words of the section are passed by. The section does not say "contributory" shall mean every person liable to contribute to the assets, but every person liable to contribute to the assets under this Act, which may well mean every person liable under this Act to contribute. We must look, then, to the other provisions of the Act, to see who are the persons liable under this Act to contribute, and on going back to the 38th section we find an exact definition of the persons who are so liable to contribute. The section is in these terms, "In the event of a company, formed under this Act, being wound up, every present and past member of such company shall be liable to contribute to the assets of the company" (using the very same words as are contained in the 74th section, which has the definition of "contributory") "to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following," and then follow the qualifications, to which I shall presently refer. Apart, therefore, from these qualifications, it seems to me that the persons who were indicated by this section as liable to contribute to the assets of the company, were the members and past members of the company, and that

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this 38th section, which is referred to by the 74th section, amounts to a description of the persons who were to be considered as liable to contribute under the Act.

But then it is said that this 38th section is subject to certain qualifications, and that among the qualifications is article 4, which says, that "in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member;" and therefore it is said that no contribution can be called for from a shareholder who holds shares which are paid up in full. But that does not seem to me at all to destroy the effect of the enacting part of the section, which says, that the members of the company, and the past members, are liable to contribute subject to the qualifications, or to destroy that provision in the section from being imported into the 74th section, which says, who are the persons liable to contribute under the Act. I think, therefore, that upon the true construction of this Act, there is enough in the 38th section, taken in connection with the 74th section, to make all members and past members of the company contributories within the meaning of the 74th section.

Without resorting, therefore, to the arguments which are adduced upon the context of the Act, as shewing how impossible it is that it could have been in the contemplation of the Legislature that those shareholders who had paid up in full should not be regarded as having the rights of contributories—I say, without reference to those arguments—I think upon the 38th and 74th sections alone, these persons ought to be considered as contributories.

I do not, however, disregard at all the value of the arguments derived from the general scope and purport of the Act; for I take the law to be, that in construing an Act of Parliament we must have regard to the whole of the provisions of the Act, and see what the intention of the Legislature was in the words which the Legislature has used. I may refer on this subject to the case of *Stradling* v. *Morgan* (1), which I have often had occasion to refer to in cases depending on the construction of Acts of Parliament, and the mode in which special words in an Act of Parliament are to be dealt with.

(1) 1 Plowd. 199.

In my opinion, therefore, the Petitioner in the present case was a contributory within the meaning of the Act, and was entitled to present this Petition.

Then it is said that there is a resolution voluntarily to wind up this company. But it is not pretended that that resolution is valid and effectual. It is perfectly clear that it is not as a special resolution; it could not take effect unless it proceeded on a distinct finding that the assets of the company were insufficient for the payment of the debts. The resolution at *Birmingham*, therefore, could not have any effect: then what is the consequence? The company is in the position in which there is no valid resolution for voluntarily winding up. It is clear, upon the evidence, that there is extreme doubt, at least, whether the company can pay their debts; and it is equally clear, upon the evidence, that the company have ceased to carry on their business. Under these circumstances, the Master of the Rolls could, I think, do nothing except make the order on this Petition for the compulsory winding up of the company.

As to the wishes of the contributories. In a concern of this description, I am not inclined to think that any packed meeting at *Birmingham*, as this seems to me to have been, is one that the Court would be guided by in determining whether there should be a compulsory or voluntary winding-up. Nor am I at all satisfied that a voluntary winding-up would be more for the interest of the shareholders of this company than a compulsory winding-up, because, although a great deal has been said about the expense of a compulsory winding-up under the order of this Court, very little has been said about the expense of a voluntary winding-up. By the 144th section of this Act of Parliament, it is provided that "All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims." And I am not at all clear that, if this matter were left under the guidance of liquidators, the expenses which would be incurred in winding up this company might not very far exceed those which would be incurred in the compulsory winding up by this Court.

We have nothing to do with the policy of the Legislature in

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having passed Acts of Parliament constituting limited liability companies; but I think that if the Legislature had foreseen what consequences that enactment would have had upon poor people, who are induced to contribute their money at the suggestion of, and upon some scheme promoted by, persons who have regard more to their own interests than to the interests of the contributories, it is extremely doubtful whether the Legislature would ever have passed this Act for limited companies at all. Certainly I entertain very great doubt whether it would have passed it without having inserted some provision for the protection of poor people, who are drawn into these companies by designing persons starting and establishing them for their own individual benefit. I always felt, from the time of the passing of the Act of Parliament, what the result of it would be, and I am sorry to say the result has only fulfilled those anticipations which I had formed when the Act of Parliament passed.

I am of opinion that the order of the Master of the Rolls in this case is right, and that this Petition must be dismissed with costs.

It was suggested that the effect of this order would be, to give the Appellants, who, though nominally the company, were in fact the directors, their costs out of the assets of the company, and the order ultimately made was, that the Respondent should have his costs out of the assets: no order as to the costs of the Appellants.

Solicitors for Mr. *Calrow*: Messrs. *Harrison & Lewis.*
Solicitor for the Company: Mr. *G. W. Brady.*

In re ANGLESEA COLLIERY COMPANY.

L. JJ.
1866
July 4;
August 4.

Joint-Stock Company—Voluntary Winding-up—Contributory—Paid-up Shareholder—Companies Act, 1862, *sects.* 38, 74, 133, *art.* 9.

A holder of fully paid-up shares in a limited liability company is a "contributory" within the meaning of the *Companies Act*, 1862. Therefore where, under the voluntary winding-up of such a company, all debts had been provided for, it was held (affirming the decision of *Wood*, V.-C.) that the liquidators were justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders.

THIS was an appeal from a decision of Vice-Chancellor *Wood*, made in the winding-up of the *Anglesea Colliery Company, Limited*. The case is reported Law Rep. 2 Eq. 379.

The company was formed in July, 1863, for the purpose of purchasing and working the *Berw Colliery* in the Island of *Anglesea*, and was registered with the articles of association contained in Table A. of the *Companies Act*, 1862.

Its nominal capital was £35,000, divided into 7,000 shares of £5 each. The company, soon after its formation, purchased the colliery for £25,000, which was paid as to £250 in cash, and as to the remaining £24,750 in 4,950 fully paid-up shares. Other shares, to the number of 825, were taken by the public.

On the 16th of January, 1865, a special resolution was passed for winding up the company voluntarily, and three liquidators were appointed, and on the 1st of February, 1865, the resolution and appointment were duly confirmed. At this time £4 per share had been paid up on the 825 shares. In the course of the liquidation the colliery was sold. It produced sufficient, with the remaining assets of the company, to pay all the company's debts and the cost of the winding-up, and there was a surplus of about £500.

In this state of circumstances two of the liquidators determined to make a call of £1 per share on all the shares on which £4 per share only had been paid, and to divide the proceeds of the call, with the £500 and the balance at the company's bankers, amongst

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all the shareholders, including the holders of the fully paid-up shares, and they accordingly passed the following resolution:— "That to enable the liquidators properly to adjust the rights of the contributories in accordance with the Act of Parliament, a call of £1 per share shall be made on all the shares upon which £4 only has been paid."

They proceeded to make the call accordingly, and thereupon the third liquidator, who objected to these proceedings, and several of the holders of shares on which £4 only had been paid, presented a Petition to the Court, praying for a declaration that the liquidators had no authority to make a call for the purpose of dividing the proceeds, or any part thereof, among the owners of paid-up shares; and that the resolution of the liquidators for a call of £1 per share, and the notices pursuant thereto, were *ultra vires* and void, and that the liquidators might be restrained from enforcing the call.

The Vice-Chancellor dismissed the Petition, being of opinion that the paid-up shareholders were contributories within the meaning of the *Companies Act*, 1862, and that the liquidators had therefore power to make a call for adjusting the rights between them and the other contributories. From this decision the Petitioners appealed.

Mr. *Rolt*, Q.C., and Mr. *Hemming*, for the Appellants:—

The call purports to be made under the authority of sect. 133, art. 9, of the *Companies Act*, 1862, which provides that the liquidators "may call on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, to pay all sums they may deem necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves." It is admitted that the only object of this call is to adjust the rights of contributories among themselves, and the whole question turns upon the meaning of a "contributory." There are three classes of persons mentioned in the Act—"members," who are defined in sect. 23; "past and present members," whose liability is considered in sect. 38; and "contributories," who are defined in sect. 74. The dis-

tinction between members and contributories is accurately kept up throughout the Act. In the 74th section, a contributory is defined to be "every person liable to contribute to the assets of a company under this Act, in the event of the same being wound-up." And in sect. 38, art. 4, a paid-up shareholder is specially mentioned as not being liable to contribute to the assets. He does not, therefore, come within the definition: *Re Cheshire Patent Salt Company* (1); *Ex parte Currie* (2); *Re Artificial Stone Company* (3); *Carrick's Case* (4).

It was not intended by the Act that a winding-up should have the same effect as a partnership suit. The sole object was, that those who are liable to creditors should contribute in their fair proportions, and that the surplus assets, if any, should be distributed; but it was not intended that a surplus should be created by calls. If any further equity exists between the shareholders, it must be enforced in a suit: *Clements* v. *Bowes* (5); *In re Bank of Gibraltar and Malta* (6).

There is no provision in the Act for working out the equity of paid-up shareholders. It is very unusual for shares to be fully paid up in advance, and in the present case the payment was merely nominal. The shares were taken as the price of the mine, and the shareholders ran the risk of its turning out profitable or the contrary. In an ordinary partnership, partners so circumstanced would have no equity for contribution after the dissolution: *Wood* v. *Scoles* (7).

Mr. *Dickins*, for other shareholders in the same interest.

Mr. *G. M. Giffard*, Q.C., and Mr. *Roxburgh*, for the liquidators:—

Under the old Winding-up Acts persons might be put upon the list of contributories who were not liable to pay anything. The 170th section of the present Act directs that the existing practice in winding up is to be the basis of the new practice. The call is made under sect. 133, art. 9, and the word "contributory" is

(1) 1 N. R. 533.
(2) 32 L. J. (Ch.) 57.
(3) 11 Jur. (N. S.) 4.
(4) 1 Sim. (N. S.) 505.
(5) 1 Drew. 684.
(6) Law Rep. 1 Ch. 69.
(7) Law Rep. 369.

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not limited by that section to persons who are liable to pay. Throughout the Act "members" and "contributories" are used as synonymous terms; and the whole scope of the Act shews that a complete winding-up was intended, so that the rights of all parties might be adjusted. This cannot be done unless paid-up shareholders are included under the term contributories: *In re Constantinople and Alexandria Hotels Company* (1).

The Act contemplates shares being paid up nominally, as in the present case; for by the 25th section, the company is directed to keep a register of the amount "paid, or agreed to be considered as paid," on each share.

Mr. *Hemming*, in reply.

August 4. SIR G. J. TURNER, L.J., after stating the facts of the case, continued:—

The substantial question raised by this appeal is, whether the holders of the paid-up shares in companies to which the Act of 1862 applies, fall within the description of contributories contained in that Act; for if they do not, it does not appear that there is any authority given by the Act to make a call for the adjustment of their rights, for which purpose the call in question has evidently been made, there being no occasion to make a call for the payment either of debts or of costs. The power to make calls is, in the case of a voluntary winding-up, by sect. 133, and in the case of a compulsory winding-up, by sect. 102, limited to these purposes,—the payment of debts and costs, and the adjustment of the rights of contributories amongst themselves; and the question, therefore, as I have said, is whether the holders of paid-up shares fall within the description of contributories. This question depends, as it seems to me, peculiarly upon the 74th and 38th sections of the Act.

[His Lordship read the 74th section.]

This section, therefore, in no way defines the persons on whom the liability created by it is to attach; but it refers to a liability

(1) 13 W. R. 851.

under the Act, and leaves it to be collected from other parts of the Act on whom the liability was intended to be fixed. Upon examining the other parts of the Act, there is nothing, that I can find, which at all describes the persons who are to be liable, except what is contained in the 38th section, and it is, therefore, to the description contained in that section that the 74th section must, as I think, be taken to refer. The 38th section is in these terms.

[His Lordship read the section, with the qualifications.]

Reading this section apart from the qualifications, there can, as it seems to me, be no doubt upon whom the liability is fixed. It is clearly fixed upon the "present and past members" of the company, and the present and past members of the company must, therefore, be contributories within the meaning of the 74th section. This part of the 38th section is in effect descriptive of the persons to whom the 74th section refers. The question then must be, what is the effect of the qualification contained in art. 4 of this 38th section, and, in my opinion, it does not derogate from the previous description. On the contrary, the qualifying clauses assume the members to be liable, and merely provide in what cases, and to what extent, the liability is to be enforced against them. I think, therefore, that, notwithstanding this qualification, all the members must be considered to be contributories. Upon these sections alone, therefore, I can hardly doubt that all members of a company, and there can be no doubt that the holders of paid-up shares are members, ought to be held to fall within the description of contributories; but when we look at the scope and purpose of the Act, any doubt which there might be upon the point seems to me to be removed.

In construing an Act of Parliament the scope and purpose of the Act is to be considered. The law upon this subject is thus laid down in *Stradling* v. *Morgan* (1).

"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an

(1) 1 Plow. 205, *a*.

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act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

Now it seems to me to be clear, beyond all doubt, that the purpose of the Act is, *inter alia*, to adjust the rights of all the members of companies which should be wound up under it. Indeed, I do not see how the rights of those members who have not paid up in full could be adjusted without the rights of those members who have paid up in full being taken into account. Throughout the Act we find members and contributories used interchangeably; I refer particularly to sect. 38, art. 7, and to sect. 101, and the terms in which the 98th section is couched seem to me to bear very strongly upon this point, inasmuch as it gives power to rectify the register of members upon the settlement of the list of the contributories. I may refer also to art. 1 of sect. 133, by which the property of the company is to be divided among its members. It was argued for the Appellants that the Legislature might have overlooked the point, that there might be shares in companies which had been paid up in full; but the 25th section of the Act answers this argument. Upon the whole case I entertain no doubt whatever that the Vice-Chancellor has arrived at the right conclusion upon the construction of the Act.

A further point was raised on the part of the Appellants, that the Act was intended merely to work out the rights of the parties as in a contribution suit, and not their rights as in a partnership suit; but I have no doubt on this point. This appeal, therefore, must be dismissed; but having regard to the importance of the question being settled, I think it should be dismissed

without costs, the Respondents taking their costs out of the estate.

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SIR J. L. KNIGHT BRUCE, L.J.:—

I am of the same opinion.

Solicitor for the Petitioners: Mr. *James Bell.*
Solicitors for the Respondents: Messrs. *Thrupp & Dixon.*

In re LEEDS BANKING COMPANY.

L. JJ.
1866
July 5, 10.

HOWARD'S CASE.

Company—Winding-up—Contributory—Conditional Acceptance of Shares—Allotment, delegation of Powers of.

Where the power of allotting shares is vested by the deed of settlement of a company in the directors, they have no right to delegate such power.

Therefore, where a shareholder who had been offered some reserved shares, accepted them conditionally, but the board of directors did not expressly assent to such conditional acceptance, but resolved that the shares remaining undisposed of should be allotted at the discretion of two of the directors and the manager; and the manager subsequently wrote the shareholder that the shares he had accepted had been allotted to him.

Upon application by the shareholder to have his name removed from the list in respect of such shares:—

Held, affirming the decision of *Kindersley*, V.C., that the board of directors could not delegate their powers; that if the shares had been allotted it was *ultra vires*, and, therefore, that the shareholder's name must be removed from the list in respect of such shares.

THIS was an appeal from a decision of Vice-Chancellor *Kindersley* removing the name of Mr. *Cooper Howard* from the list of contributories in respect of forty reserved shares in the *Leeds Banking Company, Limited*, which had been allotted to him.

Mr. *Howard* was originally the holder of 200 shares in the *Leeds Bank*, and the directors having resolved to allot the reserved shares, the manager of the bank, in pursuance of a resolution passed by the directors on the 22nd of June, 1864, sent a circular to Mr. *Howard*, offering him forty of the reserved shares, being

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one for every five shares he then held, at £30 per share, and the circular concluded as follows: "If taken up, the amount must be paid to the bank on or before the 1st of October next; if paid before that time, interest at five per cent. will be allowed, and the shares will then be entitled to one quarter's dividend at the end of the year."

On the 7th of July, 1864, Mr. *Howard* wrote to the manager of the bank a letter stating that he had been ill, but wanted to see him about the new shares, and added, "I should wish to take what falls to me, allowing me until February to pay for them."

It appeared from the affidavit of the manager, that a few days after the receipt of this letter he wrote against Mr. *Howard's* name in the allotment paper, after the forty shares, the words "accepted for February."

On the 14th of July, 1864, a board meeting of the directors was held, when the allotment paper was before them, at which they passed resolutions relating to the allotment of shares which had been accepted, but did not pass any resolution with regard to Mr. *Howard's* condition that he was to be allowed till February to pay for them. They, however, at that meeting, passed the following resolution: "That the allotment of the shares remaining undistributed, shall be allotted according to the discretion of the manager and the two private directors."

On the 22nd of July, 1864, the manager wrote a letter to Mr. *Howard*, telling him, "the number of shares allotted to you, are the forty accepted by you."

The banking company stopped payment in September, 1864, and no payment was ever made by Mr. *Howard* in respect of his new shares. The company was ordered to be wound up in October, 1864.

The deed of settlement of the company provided that the allotment or distribution of such of the shares as had not been subscribed for, should belong to and be vested in the directors of the company for the time being, and should be disposed of by them in such manner as in their opinion would best promote and advance the credit and interest of the company. The deed also provided, that three of the directors should constitute a board.

Mr. *Howard* owed the bank considerable sums for unpaid calls.

When the adjourned summons came on first, it being suggested that there was no evidence that the directors had accepted Mr. *Howard's* offer, the summons was adjourned back to Chambers to give the official liquidator the opportunity to adduce such evidence. The only further evidence adduced was, as to what took place at the meeting on the 14th of July, that the words "accepted for February," were in the list when produced at that meeting, and an affidavit of the two private directors that they must, as such, have seen and concurred in the acceptance of Mr. *Howard's* offer.

The case came on before Vice-Chancellor *Kindersley*, who granted the application (1).

(1) The judgment of the Vice-Chancellor (June 25) was as follows :—

"I am of opinion that Mr. *Howard* ought not to be retained on the list of contributories, [in respect of the forty reserved shares.

"Had Mr. *Howard* simply accepted the forty shares offered to him, there would have been a complete contract between him and the company; but he accepted the shares only upon the condition that he should be allowed until February to pay for them. On the 22nd of July the manager wrote to Mr. *Howard*, that the number of shares allotted to him were the forty shares he had applied for, and it appears to me that, supposing that that answer had been the answer of the company, it would have been an acceptance of the additional term proposed by Mr. *Howard:* the question therefore is, whether that answer can be regarded as coming from the body which alone had the power of dealing with the matter, namely, the board of directors.

"It appears that by the deed of settlement under which the company is constituted, the power of dealing with these shares was delegated to the board of directors, of whom three were to constitute a quorum. When the answers of Mr. *Howard*, and of the other shareholders, to the circular had been received, a list was made out, shewing what number of shares had been accepted or declined, and against Mr. *Howard's* name the words 'accepted for February,' were added. This list having been made out by the manager, came before a board meeting of the directors held on the 14th of July, and at that meeting two resolutions were passed; the first dealing with cases where shareholders had applied for *additional* shares, which does not apply to this case; and the second resolution providing that the shares remaining undistributed should be allotted according to the discretion of the manager and the two private directors. What is meant by the words 'remaining undistributed?' Do they comprise the forty shares now in question? It appears to me that they do. No resolution was passed with regard to those shares, and there was no acceptance by the board of directors of the terms proposed by Mr. *Howard.*

"Then arises the question, whether the board of directors had power to delegate the allotment of shares to the manager and two private directors. I think they had no such power, and that the rule *delegatus non potest delegare* applies. Mr. *Howard* could not have filed a bill for specific performance

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The official liquidator moved before the Lords Justices by way of appeal from this decision.

Mr. *Glasse*, Q.C., and Mr. *Cotton*, for the official liquidator, in support of the appeal:—

We cannot deny that *Howard's* letter of the 7th of July was not an acceptance of the offer of shares, but involved a new term; so that acceptance of it by the directors was necessary to create a contract. We submit with confidence, however, that the directors, at the meeting of 14th of July, did accept *Howard's* terms, by acting upon his proposal, and passing a resolution for the allotment of the shares which remained after subtracting a mass of shares, among which those applied for by *Howard* were included. The company would have had no defence to a bill by *Howard* for specific performance. His letter was registered, and a memorandum made against it in the book, "accepted for February." The Vice-Chancellor seems to have considered that a formal resolution of the directors was necessary. But that, we submit, is not the case. The case resembles *Ex parte Barrett* (1).

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against the company in respect to these shares; for the answer to such a bill would have been, that the company never authorized the manager and the two private directors to allot the shares, but only authorized the board of directors to do so.

"Another reason may be suggested against fixing Mr. *Howard's* name on the list in respect of these forty shares. If he had simply accepted the shares, paying for them in October, then he was to be entitled to a quarter's dividend, and if he paid before that time, he would have been allowed interest; if, then, he was to be allowed till the following February to pay for them, would he be entitled to the quarter's dividend, and could he be charged with interest on the money from October to February?

"Here is, therefore, a term left uncertain in the alleged contract; or, if the effect was to give him the dividend without his paying interest, the manager and private directors agreed to an arrangement contrary to the terms on which the board of directors had originally resolved that the shares should be allotted. It is, however, not necessary to go further into those questions, because for the reasons I first stated, I must hold that the board of directors did not accept Mr. *Howard's* offer, and that the two private directors and manager had no power to accept it; and, therefore, that his name must be removed from the list in respect of these forty shares.

"The costs of the official liquidator will be paid out of the estate; but as Mr. *Howard* is a debtor to the bank for unpaid calls, I cannot order his costs to be paid to him; but he will be at liberty to retain them out of what is due from him to the bank."

(1) 2 Dr. & Sm. 415; 3 De G. J. & S. 30.

Mr. *Osborne*, Q.C., and Mr. *Bunting*, for *Howard*:—

There was no acceptance, and so no contract, as in *Addinell's Case* (1). The registration of *Howard's* letter, which is talked of, was nothing but an entry of it in a letter-book, and such entry had nothing to do with the allotment of shares. There is no evidence that the directors even knew of the terms introduced by *Howard*. If they had proceeded to give directions as to the allotment of the remaining shares, after specifically excepting his, there might have been some ground for contending that they had by implication made an allotment to him; but their resolution only lays down a principle, and is expressed so generally, that it cannot be made out from it whether they treated the shares applied for by him as having been allotted or not. The manager and private directors had no valid authority to allot.

Mr. *Cotton*, in reply.

July 10. SIR G. J. TURNER, L.J.:—

My opinion in this case agrees with that of the Vice-Chancellor, for the following reasons. It was not denied, nor could it be denied, that the answer of *Cooper Howard* to the offer made to him by the directors, of a portion of the unissued shares, was conditional upon the acceptance by the directors of the new term introduced by him, that he should not be called upon for payment until the following February. An acceptance by the directors of this new term was, therefore, necessary to complete the contract. The question is, whether there was any such acceptance on their part. It was not pretended that there was, unless the resolution of the 14th of July, 1864, amounted to such an acceptance; and I am of opinion that it did not. That resolution dealt with a wholly different subject, the distribution of so many of the unissued shares as remained after the answers had been returned to the first offer made by the directors. It neither affirmed nor disaffirmed those answers, nor, except in this particular case, was there any need for such affirmance or disaffirmance, for, except in this particular case, the con-

(1) Law Rep. 1 Eq. 225.

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tract was either complete, or was negatived by those answers. If, indeed, it could have been shewn that this resolution could not take effect without the forty shares in question being reckoned as shares which had been accepted, it might, by necessary inference, have been held to operate as an acceptance of the conditional offer which *Cooper Howard* had made; but it is plain that this was not the case, for the resolution would apply to all the shares which were not reached by the first offer, including those which were declined. The true state of the case, therefore, is this, either that the resolution did not at all apply to these forty shares, or that if it at all applied to them, they fell within the class of undistributed shares to which the latter part of the resolution refers; and in either of these views the opinion of the Vice-Chancellor seems to me to be right—in the one case, because there was no acceptance of the new terms; and in the other, because the delegation of authority was unwarranted. The case is more strong against the Appellant, because the onus of proving the acceptance of the new term introduced by *Cooper Howard's* offer rested, as I apprehend, upon him. This appeal, therefore, must be dismissed. The official manager must take his costs out of the estate, and *Cooper Howard's* costs must be dealt with as the Vice-Chancellor dealt with his costs of the original hearing.

SIR J. L. KNIGHT BRUCE, L.J.:—

I do not dissent.

Solicitors for Mr. *Howard:* Messrs. *Stuart & Massey.*

Solicitors for the Official Liquidator: Messrs. *Freshfields & Newman.*

In re ROLLING STOCK COMPANY OF IRELAND.

L. JJ.
1866
July 19.

SHACKLEFORD'S CASE.

Company—Winding-up—Contributory—Conditional Application for Shares.

S., a railway carriage builder, had an interview with the secretary of a company which had just been formed for dealing in carriages, as to *S.* taking shares, and paying the calls in rolling stock. He then sent in an application requesting the directors to allot him 2000 shares, all future calls to be paid "in rolling stock, as arranged." The directors returned no answer, but put his name on the register of shareholders for 2000 shares. He never received notices, nor was treated as a shareholder:—

Held, affirming the decision of *Wood*, V.C., that there was no concluded contract by *S.* to take shares, and that he was not a contributory.

THIS was a motion, by way of appeal from an order of Vice-Chancellor *Wood* removing the name of Mr. *Shackleford* from the list of contributories of the *Rolling Stock Company of Ireland, Limited.*

The company was formed in the year 1862, its object being "the building, repairing, purchasing, and selling of engines, tools, railway and other carriages, and waggons of all descriptions, and letting on lease, and hiring the same to railway companies, freighters, and others, in *Ireland* and elsewhere." The capital was £200,000, in 20,000 shares of £10 each. According to the prospectus which was issued £1 per share was to be paid on application, and £1 more per share on allotment.

On the 26th of July, 1862, before the company was registered, Mr. *Shackleford*, the principal partner in a firm of railway carriage and rolling stock manufacturers, having seen a prospectus of the company, wrote to the directors as follows:

"I have read the prospectus of your company with much satisfaction, and think the opening for a successful business is guaranteed by the influence your board will command among railway interests. I am prepared to send in my application for 2000 shares, accompanied by a cheque for £2000, upon your assuring me that you will use your best endeavours to give our firm the

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contract for supplying rolling stock, and undertaking that in the event of such an arrangement not being carried out, the shares shall not be allotted to me, and the deposit consequently returned."

After this, Mr. *Shackleford*, as he deposed in an affidavit which was not contradicted, had an interview with the secretary and others engaged in promoting the company; and arranged with the secretary to take shares if he or his firm was or were employed to build carriages for the company; and, at length, he agreed to take 2000 shares on the condition that all further payments on the shares beyond the £1 payable on application should be paid in rolling stock, and not in cash. This arrangement was made verbally with the secretary.

The company was registered on the 7th of August, 1862.

On the 22nd of August, before sending in his application for shares, Mr. *Shackleford* received the following letter from the secretary, dated on that day:

"At our board to-day the question of your sending in an application for 2000 shares was discussed, and it was decided that if you did so, you should have the first contracts of the company, and that all calls made shall be placed to your account with the company, instead of your being called to pay up on them."

There did not appear on the books of the company any record of the above arrangement except the last mentioned letter, and the application for shares mentioned below; nor did it appear on the books that any meeting of directors was held on the 22nd of August; nor that any such resolution as mentioned in the secretary's letter was ever come to by the directors.

On the same 22nd of August, 1862, Mr. *Shackleford*, after receiving the secretary's letter, sent in the following application:—

"Gentlemen,—Having paid £2000 to your bankers, I request that you will allot me 2000 shares in *The Rolling Stock Company of Ireland, Limited*, or any less number, which I hereby agree to accept, and to pay the further sum of £1 per share on the number allotted to me, and all future calls when required, *value in rolling stock as arranged;* and I further authorize and empower you to insert my name in the register of shareholders of the company for the number of shares that may be allotted to me."

No answer was received to this application. The shares in the company were allotted in August, 1862; and Mr. *Shackleford's* name was inserted in the register of members for 2000 shares, but he never received any notice of allotment; the company never applied for the £1 per share payable on allotment; a further call of £1 per share was made in the same year, but no notice of it was given to Mr. *Shackleford*, nor was he ever employed to provide rolling stock for the company.

In October, 1862, an agreement for an amalgamation with *The General Rolling Stock Company, Limited*, was come to; and on the 26th of that month Mr. *Shackleford* received a notice of a meeting of the shareholders in the amalgamated companies, to be held for the purpose of changing the name of the company. Mr. *Shackleford* then wrote to the solicitor of the company as follows:—

"I understand that *The Rolling Stock Company of Ireland* has amalgamated with *The General Rolling Stock Company*, and shall feel much obliged by your informing me whether this is likely to prevent the arrangement made with me as regards the supply of rolling stock being carried out; as, if so, I must apply for repayment of the amount of the deposit on the shares I have taken in the company."

Some correspondence took place, which did not lead to any satisfactory result. In June, 1863, a different agreement for the amalgamation of the two companies was come to; and in the same month, Mr. *Shackleford* received a notice, informing him that a meeting of shareholders was about to be held to confirm the amalgamation; and that for the purpose of effectuating it *The Rolling Stock Company of Ireland* was to be wound up voluntarily; and that the shareholders in that company might either receive shares in the new company, or the value of their shares in cash.

Mr. *Shackleford* wrote back, consenting to accept cash, and the sum of £2000 was thereupon paid to him. He had never attended any meeting of shareholders, nor received any dividend, nor acted or been treated as a shareholder, further than as above mentioned. He never made any transfer or surrender of shares.

Subsequently, the company was ordered to be wound up, on the

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petition of a creditor who became such before the amalgamation; and the question whether Mr. *Shackleford* ought to be on the list of contributories was decided in the negative by Vice-Chancellor *Wood* (1). From this decision the official liquidator appealed.

(1) The Vice-Chancellor's judgment was as follows:—

"I think that this case must turn upon the question whether there was ever a complete contract between Mr. *Shackleford* and the company that he should become a shareholder. If a person simply applies for shares, and shares are allotted to him, the application and allotment constitute a complete contract, even though the allotment be not communicated to him: *Bloxam's Case* (33 Beav. 529; 12 W. R. 995, L.J.). But to have this effect, the allotment must be an acceptance of the application according to its terms. Here Mr. *Shackleford's* offer was to take shares on the terms of paying the calls, except the first payment of £2000, in rolling stock, and not in money. Assuming it to be competent to the company to allot shares on these terms (and I do not know that there would be anything illegal in their doing so, and entering a minute as to the terms on which the shares were to be held), they were at liberty to accept his offer, or not. If it was not competent to them to allot shares on these conditions, they ought to have informed him at once that the thing could not be done. If it was competent to them to make such an allotment, they might either decline his offer, or allot him shares upon the conditions of that offer, in which latter case there would have been a complete contract; but an allotment to him *simpliciter* was no acceptance of his qualified offer. The authority which he gave to have his name inserted in the register of shareholders must be read as subject to the same terms, and shares not having been allotted to him on those terms, I think he never was liable to become a shareholder.

"The authorities, though none of them are precisely in point, appear to me in a great degree to support this view. *Woodfall's Case* (3 De G. & Sm. 63) is not a very strong authority, as it may be doubtful how far such a dealing in mere scrip could impose on Mr. *Woodfall* the obligation to become a shareholder; but so far as this case goes, it supports the view I have taken. *Wood's Case* (3 De G. & J. 85) is more nearly in point, and is in substance very similar to the present, though different in form. *Davidson's Case* (3 De G. & Sm. 21) went upon fraud, *Davidson* having allowed his name to be placed on the list, and remain there for a number of years, for the purpose of tempting other persons to become shareholders. In *Woollaston's Case* (4 De G. & J. 437) there was no condition precedent, there was only a collateral bargain, the non-fulfilment of which was merely a breach of contract, for which Dr. *Woollaston* might have a remedy against those who broke it, but not any right on that ground to escape from the liabilities of a shareholder. In the present case there was an offer to take shares upon certain terms, which was met by an allotment *simpliciter* to the applicant, and by putting his name *simpliciter* on the list of shareholders. This was no acceptance of his offer. He had a right to suppose that the shares were given to him on his own terms. He never sold them or dealt with them, nor acted as a shareholder. On the breaking up of the company, he merely received his money back, which was quite consistent with his never

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Mr. *G. M. Giffard*, Q.C., and Mr. *Lindley*, for the appeal motion :—

Looking at sections 23, 38, 74, of the *Companies Act*, 1862, a person who has agreed to take shares, and whose name is on the register of shareholders, is a contributory. Had the case rested on the letter of July, it would have stood very differently; it would then have been more like *Wood's Case* (1); it might have been argued that there was an agreement to take shares subject to a condition precedent which was never complied with. Here it is plain that *Shackleford* agreed to take shares; there was only a collateral agreement that he should pay the calls in a particular way. Suppose he had been sued for calls, what defence would he have had? He had agreed to pay, and the agreement that he should pay in rolling stock would not be a defence to an action, nor give a right to an injunction, but would only give a right of set-off. To hold that the agreement was for a set-off will give it a reasonable meaning; for it is clearly implied in section 101 of the *Companies Act*, that a shareholder has no right of set-off in the case of a limited company; and an express contract for a right of set-off was, therefore, useful. That no notice of allotment was given to Mr. *Shackleford* is not material: *Bloxam's Case* (2); even on the supposition that *Shackleford's* letter of the 22nd of August was a proposal; but it is clear that it was a written accession to terms previously arranged with the company, so that upon its being written and sent the contract was complete. The appearance of *Shackleford's* name on the register, where he authorized it to be placed, has influenced the public, and other persons have become shareholders and creditors on the faith of his being a shareholder. That the promoters did not observe their bargain with him does not release him: *Nickoll's Case* (3); *Daniell's Case* (4).

Mr. *Rolt*, Q.C., and Mr. *Graham Hastings*, for *Shackleford* :—

The questions are, were our terms accepted, and if they were

having been a shareholder. I think, therefore, that he has done nothing to debar him from insisting that there never was any concluded agreement for him to become a shareholder; and the list must be amended by striking out his name."

(1) 3 D. G. & J. 85.
(2) 33 Beav. 529; 12 W. R. 995, L.J.
(3) 24 Beav. 639.
(4) 23 Beav. 568; 1 De G. & J. 372.

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accepted, did the company perform them. We say: 1. That there never was a contract for shares at all, our terms never having been accepted. 2. That if they were accepted so as to make a contract, our agreement to take shares was subject to a condition precedent which has never been performed. It has been argued that we have no defence to an action for calls, but every ground, both of law and equity, is open to us here. It is clear that *Shackleford's* letter of the 22nd of August was an offer to take shares on certain terms. A question has been raised, whether the directors had power to agree to such terms as *Shackleford* proposed; if they had, which probably they had, the contract, if there was one, was entire, and cannot be severed. If they had not, then if they accept on a condition with which they cannot lawfully comply, and nothing more is done, the contract is void. Here all that was done was that *Shackleford's* name was put on the register. He never was in any other way recognised as a shareholder. Putting him on the register was no acceptance of his terms, for it was making him liable to pay in cash. *Bloxam's Case* does not touch the present; where a simple application is made for shares a simple allotment without more may be a sufficient accession to it, but a simple allotment is no answer to a conditional application. *Shackleford's* receiving back his £2000 was no admission that he was a shareholder; he had a right to receive it back if he did not become one. The argument that other persons have been misled by seeing *Shackleford's* name on the register is worthless; a man incurs responsibility by authorizing the use of his name, but not by the unauthorized use of it. The argument begs the question whether there was any authority to put his name on the register. *Daniell's Case* turned on there being no contract at all as to non-liability, because *Daniell* being a director could not make such a bargain with himself. *Woodfall's Case* (1), *Wood's Case* (2), are for us.

Mr. *Giffard*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

This appeal proceeds on the notion that there was a contract between the Company and the Respondent. There must be two

(1) 3 De G. & Sm. 63. (2) 3 De G. & J. 85.

parties to a contract, and both parties must agree upon one set of terms. There is, in my opinion, a total absence of evidence that the Company and the Respondent here ever agreed upon one set of terms. There was, in point of fact, as it appears to me, clearly no contract at all, and as there is no proof of a contract the foundation of the case brought before the Vice-Chancellor wholly fails, and the Vice-Chancellor, in my opinion, had no option but to proceed as he did, and I think his judgment should be affirmed.

SIR G. J. TURNER, L.J.:—

I cannot say that I am quite so clear upon the point as my learned brother has expressed himself to be, but I am inclined to think that, upon the whole, the judgment of the Vice-Chancellor is right, and for these reasons. Mr. *Giffard* has put the case upon the only ground on which it could be put, that the letter of Mr. *Shackleford* of the 22nd of August, 1862, was an acceptance of the terms proposed to him, on the part of the company, by the secretary's letter of the same date. Now, I confess I cannot arrive at that conclusion. The secretary's letter is in these terms. [His Lordship read the secretary's letter of the 22nd of August.] The effect of that letter would be, as I understand it, that if orders were given by the company to Mr. *Shackleford* to a less extent than the amount which was due from him in respect of the calls, he would be left liable to the company for the difference between the amount of the calls and the amount of the orders, and it seems to me that Mr. *Shackleford's* letter in answer, if I may so treat it, for I suppose it must be considered as a letter in answer, does not at all agree with that view. [His Lordship read the letter.] Now, I understand that to mean, and I think—looking to the letter of the 26th of July, and to the interview which took place between Mr. *Shackleford* and the secretary of the company, between the 26th of July and the 22nd of August—that it must be considered as intended, on the part of Mr. *Shackleford*, to express that all calls were to be satisfied by the orders which were to be given to him by the company, and not merely that he was to be left a debtor to the company in respect of any excess of calls on shares beyond the orders that might be given. Therefore, it seems to me that there was a variation of the terms expressed by

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Mr. *Shackleford* in his letter of the 22nd of August, from the terms which were contained in the secretary's letter of the same date, and that that variation required acceptance on the part of the company.

Then with reference to the argument that has been so strongly urged by Mr. *Giffard* on the part of the company, as to Mr. *Shackleford's* authority to the company to place his name upon the register of shareholders, I think, according to the true meaning of the letter and the correspondence taken together, it must be considered as merely giving them authority to put his name upon the register on the terms contained in his letter, which were, that on the shares which he had taken in the *Rolling Stock Company* he should not be called upon to pay in money.

Upon these grounds I am inclined to think that the Vice-Chancellor's decision is right; but as it is unnecessary for me to give any opinion upon the case, I say no more than that I rather incline to his view.

Costs of both parties to come out of the estate.

Solicitor for Mr. *Shackleford*: Mr. *Vining*.

Solicitors for the Official Liquidator: Messrs. *Ashurst, Morris, & Co.*

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In re RUSSIAN (VYKSOUNSKY) IRON WORKS COMPANY.

STEWART'S CASE.

Companies Act, 1862, s. 35—*Shareholder—Variance between Prospectus and Memorandum—Striking Name off Register—Notice—Acquiescence.*

The course of proceeding under the 35th section of the *Companies Act*, 1862, considered.

Before a company had been registered, a person applied for shares on the faith of a prospectus stating the objects of the company, and immediately after its registration shares were allotted to him. The objects of the company, as defined by the memorandum of association, extended much further than the prospectus:—

Held, that he was entitled to have his name removed from the register.

The company was registered on the 28th of April, 1865. In the autumn

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the committee of the *Stock Exchange* refused to appoint a settling-day, on the ground of a variance between the prospectus and memorandum in a point of minor importance. *S.*, who had taken shares on the faith of the prospectus, attended a meeting in September, held for the purpose of correcting this variance:—

Held, that his attending this meeting was not a sufficient ground for fixing him with notice of the more important variances between the prospectus and memorandum, so as to affect his rights by acquiescence, he positively swearing that he did not know of those variances, and had never seen the memorandum, or had any acquaintance with its contents, till May, 1866, when he at once repudiated his shares.

THIS was an appeal by the *Russian (Vyksounsky) Ironworks Company, Limited*, from an order of Vice-Chancellor *Wood*, removing from the register of shareholders of the company, the name of Mr. *Stewart*, the holder of twenty shares, on the ground of substantial variance between the memorandum of association and the prospectus on the faith of which the applicant took his shares.

The prospectus, which was issued some time before the registration of the company, defined the object of the company as follows:—

"This company is formed for the purpose of *acquiring and extending* the well-known ironworks, which have been established and in successful operation for a long period at *Vuicksa*, in *Russia*."

The prospectus then proceeded to set forth the advantages of the estate, which covered an area of 405,000 English acres, and contained 35,000 inhabitants, and had under it valuable mines, and upon it valuable forests, and to particularize the works then in operation upon it. The prospectus then proceeded as follows:—

"The price at which the company's interest in the property, as defined below, has been conditionally acquired, is the sum of £60,000, in addition to which an estimated sum of £35,000 will be required to pay off existing charges on the property, and it is calculated that the sum of £70,000 will be required for working capital, making together £165,000, which is the whole amount proposed to be called up."

The prospectus then went on to shew what the rate of profit at present was, and to state that by arrangement with the proprietors, and hypothecation or mortgage to the company of their reserved

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interest in the estate, 87,000 roubles (£11,000), being about 7 per cent. per annum upon the whole capital proposed to be called up, was guaranteed to be first paid to the shareholders of the company, and that of the surplus profits three-fifths would belong to the present proprietors, and two-fifths to the shareholders, for a period of thirty-seven years, being the duration of the leasehold interest of the company. It then went on—

"Thus on an estimate of the profits at the present time, and without considering the improvements likely to result from an increase of capital, a dividend of about £20 per cent. per annum is shewn upon the capital (£165,000) required to be called up. In the above estimate no account has been taken of the profits upon the manufacture of steam-engines, boilers, &c., and it is anticipated that by the introduction of further capital, and the development of the works, the returns will be more than doubled.

"It is intended to create a sinking fund for the purpose of returning to the shareholders, at the expiration of the thirty-seven years, when the interest of the company will cease, the whole amount of the capital called up. On the determination of the lease, the proprietors bind themselves to have a valuation made of all the property above ground, and, after deducting the present value, to pay to the company one-half of the difference in cash. Thus, in addition to receiving a highly remunerative dividend during the thirty-seven years, at the end of that time the whole of their capital will be returned to the shareholders with a considerable bonus."

The remaining parts of the prospectus need not be referred to for the purposes of the present question.

On the 22nd of April, 1865, Mr. *Stewart*, having seen the above prospectus, applied for shares, and paid a deposit of £1 per share.

On the 28th of April, 1865, the memorandum and articles of association were registered. The memorandum, dated the 26th of April, defined the objects of the company as follows:—

(*a*) "The acquiring, leasing, and working iron mines and works in *Russia*, and raising all iron and other ore and minerals to be found therein, and selling or otherwise using, disposing, and making a profit of the same.

(*b*) "Working mines, iron works, the building of ships, the forging, casting, and rolling of iron, the construction of wrought and cast-iron work, and the manufacture of all kinds of engines and engineering work.

(*c*) "The acquiring lands in *Russia*, and the erecting of all buildings thereon necessary for any of the objects of the company, and the leasing, letting, sub-letting, exchanging, or otherwise disposing of the same, or of any of the mines, pits, or quarries of the said company.

(*d*) "The borrowing of money, and the issue of transferable or other bonds, or mortgage debentures, or any other securities, founded or based upon all or any of the real or personal assets or credit of the company.

(*e*) "And generally the carrying on the business, and the transacting and doing of all such matters and things as the company may from time to time consider conducive or incidental to the above objects, or any of them."

On the 29th of April, 1865, twenty shares were allotted to Mr. *Stewart*.

In the autumn of the same year, the committee of the *Stock Exchange* refused to give the company a settling-day, on the ground that one of the articles of association gave to the directors a power of increasing the capital, which was inconsistent with the prospectus. In consequence of this refusal to appoint a settling-day, an attempt made by Mr. *Stewart* to sell his shares was ineffectual. On the 13th of September a meeting of the company, which Mr. *Stewart* attended, was held for the purpose of rescinding the objectionable article, and substituting a clause conformable with the prospectus.

In April, 1866, a committee was appointed to investigate the affairs of the company, and in the course of this investigation Mr. *Stewart*, as he deposed, became, on the 30th of May, for the first time acquainted with the difference between the prospectus and the memorandum as to the objects of the company; and on the following day he gave notice that he repudiated his shares. He subsequently applied, under the 35th section of the *Companies Act*, 1862, to have his name taken off the register. In support of this

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he deposed that he had never, until the 30th of May, 1866, seen the memorandum or articles of association, or known or heard the same, or any part thereof, read.

On the 28th of June, 1866, Vice-Chancellor *Wood* made an order removing the name of Mr. *Stewart* from the register (1).

The company appealed.

(1) The judgment of the Vice-Chancellor was as follows:—

"There are certainly some points in this case which require a great deal of consideration; but, on the whole, I am not able to distinguish it from *Ship's Case*. I think it is very important that the principle on which the decision in that case proceeded should be firmly adhered to: that when a company is established, the subscribers, who have been induced by a prospectus to join it, must be taken to have reposed entire faith in those who have the conduct of the proceedings relative to its registration, and to have relied on their taking care that the contract to which the subscribers are ultimately made parties, by means of the memorandum of association, is the same contract as that referred to by the prospectus. In other words, the directors cannot be allowed to obtain the consent of a man to one contract, and then, without his consent or knowledge, to substitute another contract in lieu of it; and in order to bind him by the substituted contract he must be found either to have had actual notice, or, as in the case before the Master of the Rolls, necessarily implied notice, of such new contract.

"In the case before the Master of the Rolls matters stood thus:—The memorandum of association was materially at variance with the prospectus; but by the prospectus (or what was called the prospectus, for probably it hardly deserved that name, as the memorandum and articles of association had been actually executed, and, therefore, the person who engaged himself was engaging himself to the articles of association) the intending shareholder was invited to become a shareholder in a company existing under a memorandum and articles of association already entered into, which memorandum and articles, moreover, he could see by going to the solicitor's office, though I am not sure that this last circumstance is material. If he was told by the prospectus that there was a contract, in which he was invited to join, then, although the nature of the contract was misstated in the prospectus, still as the contract itself was in existence, probably the Court was right in holding that he must be taken to have known that which he was engaging to do.

"But in this case a course has been taken which it is to be hoped will become antiquated, namely, that of sending out the prospectus before the memorandum of association is registered. I think it would be a much wiser course for all persons projecting these companies to take care that the memorandum is registered first, and to leave every person who becomes a subscriber to go and look at the document for himself; but if they do not do that, it is their duty, as was held in *Ship's Case*, to take care that in the memorandum there shall be no departure in substance from the contract to which the subscriber has given his consent. Unfortunately, I am obliged to hold that in this case there has been a material departure from the contract.

Sir *R. Palmer*, Q.C., Mr. *Rolt*, Q.C., Mr. *Waller*, and Mr. *Druce*, for the company:—

The proceedings were improperly taken under the 35th section

I am not desirous of throwing out that the directors have acted wilfully in breach of the prospectus; the case in this respect differs very widely from *Ship's Case*, where the memorandum most outrageously departed from everything to which the shareholder had given his consent. In this case, by inadvertence perhaps, the memorandum has been made wider than the prospectus, and, consequently, it is not that which the subscriber consented to abide by. The prospectus being for the working of a company to be called the *Russian (Vyksounsky) Iron Works, Limited*, the intended subscribers are told that 'The company is formed for the purpose of acquiring and extending the well-known ironworks which have been established and in successful operation for a long period at *Vuicksa*, in *Russia*.' No doubt they are told two things—that they are to *acquire*, and that they are to *extend*, the works; and I think the Court would have given to the memorandum of association very large latitude in reference to that word *extending*, in order that the company might have full powers, if necessity arose, of acquiring either adjacent iron works, or other works immediately connected with the object in hand, provided it was all *bonâ fide* for the purpose of extending the operations of a given concern which they were about to buy. The concern is described as consisting of two things—the estate which produces the ore, and on which the manufacture of iron is conducted, and also the manufacture of iron for sale, in its various forms, in machinery, engines, steam-boats, and any other objects to which the manufacture of iron can be properly applied. Probably, if the case had rested there, and had been merely that of a company entitled to an estate in fee simple, conducting their business on a given spot with a given capital, it might be legitimate to say, that if it was found necessary to shift the trade to another spot, the company, as long as it carried the goodwill, might shift it for the purpose of the original business. But the prospectus is much more definite as to the estate, and as to the character of the company, and the degree of liability to which any person who joined it would commit himself, as to the duration of his engagement, and the time that his capital would be involved in the work in hand, because he is told that this is not a freehold estate, but that they have got a leasehold interest for thirty-seven years, that it produces such and such profit, and then, after describing how the profit is made out, it is said, 'it is intended to create a sinking fund for the purpose of returning to the shareholders, at the expiration of the thirty-seven years, when the interest of the company will cease, the whole amount of the capital called up. On the determination of the lease the proprietors bind themselves to have a valuation made of all the property above ground, and, after deducting the present value, to pay to the company one-half of the difference in cash. Thus, in addition to receiving a highly-remunerative dividend during the thirty-seven years, at the end of that time the whole of their capital will be returned to the shareholders, with a considerable bonus.' Of course, a sub-

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of the *Companies Act*, 1862 (1). Under that section the Court can only determine whether the register has been correctly made out—whether the party is *de facto* a shareholder. It was not intended to be a substitute for a suit in equity, so as to enable a

scriber has no right to regard all this as a statement of facts: it is a matter of speculation whether he will have his capital back; but he has a right to say, 'The thing I am invited to subscribe to is this—we take a leasehold concern for thirty-seven years, we shall do our best to extend its business, we shall extend it as far as we can, we take an ample latitude as to that, but, having worked it for thirty-seven years, we shall wind up the concern, and each shareholder will have his capital returned to him.' The return of the capital is a matter of speculation, of course; but there is no speculation as to the time of the duration of the concern. It appears to me that the company could not, on that prospectus, bind this gentleman to do anything more than to be a member of a company formed on this estate, held for the term of thirty-seven years—it might be less, but it could not be more—for they do not state that the company is to take any power to renew the lease, or anything of the kind. They are to take that property and work it, make

(1) 25 & 26 Vict. c. 89. The section is as follows:—

"If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's superior courts of law or equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland*, by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in, or omitted from the register, whether such question arises between two or more members, or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court, if a Court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by the *Common Law Procedure Act*, 1854, shall lie.

shareholder to try his right to rescind his contract with the company: *Ex parte Briggs* (1).

There was no variance in substance between the prospectus and the articles of association. The prospectus states that the company

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the best of it they can for thirty-seven years, and at the end of that time divide the whole capital.

"Then, after this, the objects of the association, as defined by the memorandum, are these — 'The acquiring, leasing, and working iron mines and works in *Russia*, and raising all iron and other ore and minerals to be found therein, and selling, or otherwise using, disposing, and making a profit of the same." It is true that the heading, the name of the company, is, '*The Russian* (*Vyksounsky*) *Iron Works Company*,' which shews that the carrying on those particular works was regarded as the primary object, but the memorandum does not say the acquiring, leasing, and working of the *said* iron works or certain other works in *Russia*, but, largely and generally, 'iron mines and works in *Russia*, and raising all iron and other ore and minerals.' Now, no doubt there are a great many shareholders who have never seen the prospectus at all, but have taken their shares on the faith of the memorandum of association; and persons in that condition have a right to say, 'I subscribed to a work of a large character, I wish to have a large field of operation,' and the directors having that mind, or a majority of the company having that mind, how could the Court prevent them from carrying out the object here referred to? Suppose that after taking the 405,000 acres, which is about the size of one of our large English counties, they took a property as large at the other end of *Russia*, 1000 miles off, how could their doing so be prevented under this memorandum of association? If that be so, this gentleman, who has not subscribed to anything of the kind, has a right to say that the contract is far larger than anything he entered into. It all turns, as it seems to me, on the first purpose '*a*,' and if that clause had been confined to 'the acquiring, leasing, and working iron mines and works *called the Vyksounsky Works* in *Russia*, and raising all iron and other ore, &c.,' the other clauses might be so read with reference to it, as to keep the memorandum within the bounds of the prospectus; but as it stands, the only confinement you can give at the most is *Russia*. The company may work any mines in *Russia*—may have any iron works in *Russia*—may have any building of ships in *Russia*—may have any quantity of cast iron and engineering works in *Russia*. That is very much larger than anything to be found in the prospectus. The prospectus is all founded upon the hope and expectation of the return from this particular mine, and upon the design that, in thirty-seven years, the capital will be returned back in the way which the prospectus described. I cannot feel any doubt, whatever may have been the intention of the directors, that this gentleman has had substituted for him a contract to which he had not given his consent, and so far this case is brought within *Ship's Case*.

"The only difficulty I have felt is how far this gentleman may be considered

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(1) Law Rep. 1 Eq. 483.

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was established for extending the ironworks, as well as for working them as they then existed. It was intended that there should be a reasonable latitude, and the acquisition of adjoining mines would be clearly within its object. But allowing that the articles were

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to have gone on after he was, or ought to be deemed to have been, affected with notice of the enlarged memorandum of association. It is quite clear that, up to the notice of the meeting in September last, he had no notice at all of it. In his first affidavit he certainly went a good deal too far, which made me more anxious to hear the reply, for I could not help feeling a certain degree of misgiving as to placing any confidence in his denial of all notice, after his stating that he had never at any time seen the memorandum or articles of association, nor heard the same, or any part thereof, read until the 30th of May last, when it turned out that, on his being summoned to a meeting in September of last year, there was a particular notice given to him that the *Stock Exchange* objected to an article as to capital as not being in compliance with the prospectus, and he was invited to attend, and did attend, that meeting for the purpose of varying that article, after which it was a strong thing to say he had never heard or known of the articles, or any part thereof, or heard them read. Of course, it was for the other side to prove the notice to him; and, if I could have found anything that could fairly lead me to the conclusion that he was affected with that notice, the mode in which he frames that affidavit would have led me to lean considerably against his denial. But the more I consider the case, the more I am satisfied that he did not know of the enlargement of the objects of the association. The observation of Mr. *Giffard* is just: that when he was summoned because the *Stock Exchange* objected to a particular article relative to increase of capital as not being in conformity with the prospectus, he, having up to that time no knowledge of the enlarged objects of the association, would, if he reasoned about the matter, naturally say, 'As the *Stock Exchange* are so extremely particular about this comparatively minute point, I cannot suppose that the memorandum and articles differ in any important points from the prospectus.' In these circumstances I cannot hold him fixed with notice by reason of his attending that meeting. He could be so fixed only on the ground which this Court must for the interests of mankind adopt, that where a person receives information sufficient to put him on inquiry, he is to be declared to have the information to which such inquiry, if made, would have led. I think that what passed was not of a nature to put Mr. *Stewart* on inquiry, but it would rather tend to blind him as to there being any other and larger change in the objects of the company than that to which the objection was taken.

"That being so, I have lastly to consider the question of acquiescence, and whether Mr. *Stewart* has done anything that disentitles him to object to the variance between the prospectus and the memorandum of association. Although you cannot fix a man with a contract different from that into which he intended to enter on the mere ground of delay, until you have brought home to him the fact that he was aware there was some such change in the contract, still he may have done such acts as to embarrass the company, and to affect his

too wide, Mr. *Stewart* has lost his right of objection by his acquiescence. He states in his affidavit, that he had not read the articles of association till the 30th of May, 1866, but he had constructive notice of them. He had paid his deposit, and attempted to sell his shares. He had also actual notice, for he attended the meeting on the 13th of September, 1865, which was held for the purpose of altering an article which was objected to as not being in conformity with the prospectus: *Hutton* v. *Scarborough Cliff Hotel Company* (1).

Mr. *G. M. Giffard*, Q.C., and Mr. *J. Napier Higgins*, for Mr. *Stewart*:—

There are numerous cases in which the 35th section of the *Companies Act*, 1862, has been made use of for determining the equity between alleged shareholders and the company: *Higgs' Case* (2); *Martin's Case* (3); *Los' Case* (4); *Braginton's Case* (5); *Ship's Case* (6). The last-mentioned case is precisely similar to the present.

There are many points in which the articles of association are objectionable, but the variation on which the Vice-Chancellor relied is conclusive. The prospectus limited the adventure, both in the estate to be purchased and the duration of the enterprise, both of which are extended by the articles. Without notice there can be no acquiescence, and there can be no constructive notice in such

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co-shareholders, or others who do not stand in the position of directors, and are in no way responsible for his having been misled. If you find he has done such acts, he is bound, and he has only himself to blame, because he did not make inquiry before he committed himself to the company. For instance, the receiving of dividends might be one of such acts. But all I find is, that he has attempted to sell his shares; he has not sold them, he has not parted with them, and he has them still. The company is not the worse, and nobody else is the worse, for anything he has done, and, therefore, he has not embarrassed his case with the rights and interests of third parties, so as to preclude him from relief; and although one may have misgivings, in a case of this kind, when there is such an affidavit as that first made by him, yet there is nothing brought home to him by which I can hold him as having had notice of the departure from the prospectus; I must, therefore, relieve him, and make the same order as was made in *Ship's Case*."

(1) 13 W. R. 574.
(2) 2 H. & M. 657.
(3) Ibid. 669.
(4) 13 W. R. 883.
(5) 12 L. T. (N. S.) 259.
(6) 2 D. J. & S. 544.

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cases: *Ex parte Marquis of Abercorn* (1). Mr. *Stewart* distinctly denies notice of the contents of the articles. The meeting in September, 1865, was held for the purpose of considering a particular clause in the articles, which had been objected to by the committee of the *Stock Exchange*, and he might well conclude that the others were in accordance with the prospectus.

Sir *R. Palmer*, in reply, referred to *Parbury's Case* (2); *Nicol's Case* (3); *Sheffield's Case* (4).

SIR J. L. KNIGHT BRUCE, L.J.:—

My view of the case is immaterial, or scarcely material, as the view taken by my learned brother agrees substantially with that taken by the Vice-Chancellor. I acknowledge that the impression originally made on my mind by the opening of Sir *R. Palmer*, was rather favourable than unfavourable to his case. As the discussion proceeded, and the matter was more opened, my impression became less favourable to Sir *R. Palmer's* case, and at present I cannot say that I see my way to differ from the conclusion of the Vice-Chancellor, which seems to me warranted by principle and precedent. I apprehend, therefore, that the present application cannot succeed.

SIR G. J. TURNER, L.J.:—

I also agree in the opinion which the Vice-Chancellor has formed upon this case. There are three questions raised. 1st. Whether upon the construction of the Act, and the circumstances of this case, the Court has power to take this gentleman's name off the register? 2nd. Whether there was such a variation between the prospectus and the memorandum of association as to furnish grounds for taking the name off the register? And 3rd. Assuming those two points to be in favour of Mr. *Stewart*, whether his conduct has been such as to deprive him of the right to come to this Court to be relieved by having his name removed from the register?

Now, as regards the first point, it is not clearly defined by the Act what the Court was intended to deal with upon an application to

(1) 10 W. R. 548.
(2) 3 De G. & Sm. 43.
(3) 3 De G. & J. 387.
(4) Joh. 451.

remove the name of a shareholder from the register; but we may, to some extent, be guided in determining what the Legislature intended, by considering the difference between the provisions of the present Act and those of the previous Act which had reference to the same subject. The former Act, which gave a power of removing the name of a shareholder from the register, had gone no further than to direct that the party might apply, and that the Court might act in removing the name from the register, without referring to any particular circumstances which were to guide the Court in the exercise of its discretion. But in the present Act, section 35, after the general provisions which were also contained in the former Act, there is this provision: "The Court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered in, or omitted from the register, whether that question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any questions that it may be necessary or expedient to decide for the rectification of the register." Now suppose a question to arise between the vendor of shares and the purchaser of shares, the purchaser desiring to have his name entered on the list, and the vendor disputing the contract and refusing to concur. Suppose, then, an application made by the purchaser, under this section, to have his name entered on the list. Would not the Court have authority to entertain the application? It is, I think, an important circumstance to be attended to in the construction of this section, that it is left perfectly open to the Court whether it will grant the application or not; and the Court, if not perfectly satisfied that the applicant had established his case, might take the course which has been taken in some other cases under these Acts, of directing the proceedings under the application to remove a name from the register to stand over until the question had been tried between the parties whether the case on which the application was founded could or could not be established. In the case I have supposed of a vendor and purchaser, where the purchaser desired his name to be put on the list, and there was a dispute upon the agreement, I cannot but think that there would be power to apply to the Court under this section to have the name

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of the purchaser entered on the register, though it would depend on the circumstances of the case, and the extent to which the purchaser established his right to specific performance of that agreement, whether the Court would interfere *brevi manu* to order the name to be entered on the register, or would direct the case to stand over till it had been decided between the parties, in a suit for specific performance, whether the purchaser was entitled to have his name entered on the register. The fact that the mode of dealing with the application is left entirely open to the discretion of the Court leads me to think that the true intent and meaning of the clause is, that application may be made for the removal of a name from the register; that on such an application being made the Court is to take into consideration all the circumstances of the case, and that, if the case be clear, it will order the name to be removed from the register; but if it be doubtful, the Court may decline to do so until the applicant has, by other proceedings, established his title to the relief which he seeks.

There being, therefore, jurisdiction to entertain the application, there arises the second question, whether there is or is not such a variation between the terms of the prospectus and the terms of the memorandum as to entitle this gentleman to have his name removed from the register? Upon this point I have not felt one moment's doubt, for upon the terms of the prospectus it is clear that this company was put before the public as a company to be established for the purpose of working the *Vyksounsky Iron Works* only; and with reference to those words in the prospectus which were relied on about extending the works, I take them to mean extending the *Vyksounsky Iron Works* which are mentioned in the prospectus; and I cannot think that under those general words it was meant to extend the operations of the company to other iron works in other countries, or even in *Russia*. But when we look at the memorandum of association it is obvious that under it any scheme might be acted upon by the directors for the purpose of carrying on, not the *Vyksounsky Iron Works* alone, but any iron works, in any part at least of the empire of *Russia*, which the directors might think proper to contract for. The memorandum goes still further, and contains a clause under which this company, which was put before the public for the purpose of working a particular

mine, might in substance be converted into a company for the purchase and sale of land. There is, therefore a most important and substantial difference between the contract, on the footing of which this gentleman entered into the company, and the effect which is attempted to be given to that contract by the memorandum of association.

This question, therefore, reduces itself, as I thought from the commencement it would reduce itself, entirely to the point, whether Mr. *Stewart's* conduct has been such as to preclude him from applying for the relief which he asks. I have felt a great deal of doubt on that point; but, in the result, I have come to the conclusion that his conduct has not been such as to bar his right to relief. It appears to me clear, that there is no evidence whatever which can fix him with knowledge of the variations which had been made between the terms of the prospectus and the terms of the memorandum of association. It is said that he attended a meeting of the company on the 13th of September, 1865, at which a variation between the prospectus and the memorandum of association was pointed out. But that variation had nothing to do with the greater and more extensive variations which now appear upon an examination and comparison of the prospectus and the memorandum of association. I think we should be going too far in fixing upon this gentleman knowledge of the alteration which had been effected by the memorandum of association. I remember that, in the great bankruptcy case of *Fauntleroy*, Lord *Eldon* intimated an opinion that every partner in a banking concern must be taken to have known the contents of his own books. The question was afterwards sent to law, and the Court of law repudiated that doctrine, and held that partners were not necessarily bound by the contents of their own books. So here, I think, it cannot be held that Mr. *Stewart* was bound to examine the memorandum of association. If there had been evidence of his receiving dividends, or doing other acts as a shareholder, I agree that he might be held to be bound by those acts, but I cannot see my way in the present case to bind him, unless it can be shewn that he had knowledge of the alteration that was made. I have very often had occasion to say, that acquiescence is founded on knowledge, and that a man cannot be said to

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acquiesce in a transaction if he is not proved to have had knowledge of it. I think that this principle requires to be attended to in all cases turning upon acquiescence. The argument having failed to satisfy me that we should be justified in holding this gentleman to be fixed with knowledge of the variation between the prospectus and the memorandum of association, I think that the third ground taken by the Appellant fails equally with the other grounds. My opinion, therefore, is, that the order of the Vice-Chancellor is right and that this motion must be refused with costs.

Solicitors for the Company: Messrs. *Newbon, Evans, & Co.*
Solicitors for Mr. *Stewart*: Messrs. *Harrison & Lewis.*

L. JJ. 1866 *May* 29; *July* 14.

In re VIZARD'S TRUSTS.

Bankruptcy Act, 1861, *sect.* 200, *Schedule D.—Appointment—Lapse.*

A fund stood limited by will, upon trust for a person for life, remainder to all or such one or more of the children or issue of the testator's deceased brother *A.*, in such shares and in such manner as the tenant for life should appoint, and in default of appointment to the children of *A.* equally. *F.*, one of the children of *A.*, assigned all his property to a trustee for his creditors, by a deed in the form of Schedule D. to the *Bankruptcy Act*, 1861. This deed was duly registered, but *F.* never obtained an order of discharge. After this the tenant for life appointed the fund by will to the children of *A.* equally. All the children of *A.* living at the testator's death survived the tenant for life, so that *F.* took the same share under the appointment as he would have taken in default of appointment:—

Held, by *Turner*, L.J., affirming the decision of *Stuart*, V.C. (*Knight Bruce*, L.J., giving no opinion), that the deed did not pass after-acquired property, that *F.*'s interest, in default of appointment, was defeated by the appointment which gave him an interest liable to be defeated by lapse, and which, therefore, must be considered a new interest, and that consequently the share of *F.* did not pass to the trustee.

Whether an appointment by deed to *F.*, of the same share as he would have taken in default of appointment, would not also have given him a new interest—*quære.*

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, who had held that the share of *F. Vizard* in certain property did not pass under a deed of assignment for the benefit of his creditors.

Under the will of *George Vizard*, the property in question stood limited to his widow for life, and after her death to all and every, or such one or more of the children of his late brothers, *John Vizard* and *Charles Vizard*, and the issue of such children as should be dead, in such shares and proportions, and in such manner and form, as the widow should by deed or will appoint; and, in default of appointment, he gave one moiety to the children of *John Vizard*, as tenants in common, and the other moiety to the children of *Charles Vizard*, as tenants in common.

In November, 1861, *Frederick Vizard*, one of the children of *Charles*, assigned all his property to a trustee for his creditors, by a deed in the form given in Schedule D to the *Bankruptcy Act*, 1861. This deed was duly registered under the Act. He never obtained any order of discharge.

In 1864 the widow made a will, by which she, in exercise of her power, appointed one moiety of the property to the children of *John*, equally, and the other moiety to the children of *Charles*, equally. The children of *John* and *Charles* all survived her.

The widow having died, the question now was, whether the share of *F. Vizard* went to him or to the trustee of the deed. Vice-Chancellor *Stuart* decided in *F. Vizard's* favour (1), and the trustee appealed.

Mr. *Malins*, Q.C., and Mr. *John Pearson*, for the Appellant:—

An appointee under a special power is in under the instrument creating the power, the appointment operating as if it was written into that instrument. This principle is illustrated by the decisions as to the applicability of the rule in *Shelly's* case, where the life-estate is created by one instrument, and the limitation to the heirs by an appointment under a power contained in that instrument: *Sugden's* Vendors & Purchasers (2). Suppose *F. Vizard* had died in his aunt's lifetime, would his interest have lapsed? The aunt had power to take away all or any part of his share. She did not exercise that power, so the original gift remains. An appointment which gives the property as it would go in default of appointment is virtually a release of the power; and if the power had been simply released, there can be no question that the assignees would take.

(1) Law Rep. 1 Eq. 667. (2) 14th ed. pp. 470, 477.

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The case of a general power, which is equivalent to absolute ownership, is quite another thing. In a case like the present the gift is by the original instrument, the power being merely given for the purpose of enabling the donee to define what shares the objects should take. As regards the operation of a special power, it was once thought that it suspended the vesting of the interests in default of appointment; and Lord *Hardwicke* so held, but he afterwards decided otherwise: *Cunningham* v. *Moody* (1); and the law is now settled that it does not. The power here is a power of selection, not a power to give to the children, but to ascertain their shares: *Peters* v. *Masham* (2). If only one object remained, the power would be gone: *Campbell* v. *Sandys* (3); a proposition which cannot be reconciled with the contention of the Respondent, that the exercise of the power creates an entirely new interest. The argument of the Respondent would lead to this, that if *F. Vizard* had sold his share, and received the money, the purchaser could get nothing. Suppose a special power of appointing among children, with a hotch-pot clause. Suppose there are five children, and the donee appoints three-fifths equally to three of them, the other two take the remaining two-fifths, surely that is their old interest; and if they take the same interest as before, how can the other three take a new interest? *Lee* v. *Olding* (4) is quite inconsistent with *Re Frowd's Settlement* (5). But even supposing *F. Vizard's* interest was a new one, we contend that it still passed by the deed. The *Bankruptcy Act*, 1861, s. 197, expressly gives the debtor the same benefits as if he had been bankrupt, so he might have obtained an order of discharge. This he has not done, and the deed operates like a bankruptcy, to pass all property acquired before such an order has been obtained: *Ex parte Morgan* (6). *Topping* v. *Keysell* (7) shews that the deed, by force of the Act, passes what it could not pass as a mere deed.

Mr. *Bacon*, Q.C., and Mr. *Chapman Barber*, for the Respondent:—

As regards the effect of a deed in the form of Schedule D., there

(1) 1 Ves. Sen. 174.
(2) Fortescue, 339.
(3) 1 Sch. & Lef. 281, 293.
(4) 2 Jur. (N. S.) 850.
(5) 4 N. R. 54; 10 L. T. (N. S.) 367.
(6) 1 D. J. & S. 288.
(7) 16 C. B. (N. S.) 258.

is no clause of the Act which can be construed as enabling the debtor to obtain an order of discharge under the Act. Section 197 does not bear on the case. The Act gives no special effect to such a deed, the words in section 200—"which shall vest all the estate and effects of the debtor in the trustees of such deed"—being descriptive, not enacting. It was not the intention of the Legislature that a debtor who executed such a deed should get a discharge; a creditor is not restrained from suing: *Eyre* v. *Archer* (1); but by section 198 he cannot issue execution without the leave of the Court of Bankruptcy. It is not to be presumed that the trustees of the deed were intended to sweep away all the property of a debtor so circumstanced, placing him in the position of a bankrupt whose certificate has been refused. The language of Lord *Westbury*, in *Ex parte Spyer* (2), shews that he only considered the deed to pass what it would do apart from the Act; and *Ex parte Gibbons* (3) shews that a deed of this kind does not carry with it all the consequences of bankruptcy. Nothing, then, can pass but what the debtor had at the time. As regards the case put, of a specific assignment for value of the interest under the will, it is beside the present case. There probably would be an equity to lay hold of the appointed share in such a case, but here is a mere general assignment of what the debtor had at the time. *Lee* v. *Olding* (4), which is referred to without disapprobation by Lord *St. Leonard's* (5), decides the present case. The appointment, for many purposes, takes effect as if written into the original instrument, but there is no relation back as to the time of the title accruing: *Duke of Marlborough* v. *Lord Godolphin* (6). All that passed by the deed here was the interest in default of appointment, and that has been divested. In *Campbell* v. *Sandys* (7), Lord *Redesdale* was referring to a mere power of distribution, which of course comes to an end when there is only one object left; but in the case of an exclusive power, where there are several objects, the appointees must be considered to take under the power. *Re Frowd* turned on con-

(1) 16 C. B. (N. S.) 638.
(2) 1 D. J. & S. 318.
(3) 13 W. R. 1001, L. C.
(4) 2 Jur. (N. S.) 850.
(5) Sug. Pow. 8th ed. p. 78.
(6) 2 Ves. Sen. 61.
(7) 1 Sch. & Lef. 28.

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tract, but assignees in bankruptcy are not purchasers: *Mitford* v. *Mitford* (1).

Mr. *Malins*, in reply.

July 14. SIR G. J. TURNER, L.J., after stating the facts, continued:—

The Appellant's claim was not attempted to be rested upon the ground that the mere possibility of interest which *Frederick Vizard* had at the time of the execution of the deed, in respect of his being one of the objects of the power to whom an appointment might thereafter be made, passed to the Appellant by deed. It was not contended that such a mere possibility of interest could be considered to form part of *Frederick Vizard's* estate and effects, or could be held to pass by the deed, and *Carlton* v. *Leighton* (2) is strong to shew that it could not; but it was insisted on the part of the Appellant that whatever *F. Vizard* took, he took under the will of the testator, and that the appointment did not displace or alter the interest which he took under the will in default of appointment, and which had passed to the Appellant by the deed, the power being, as it was said, a power of selection only. I think, however, that the power in this case was something more than a power of selection. It was a power to distribute, no less than to select, and it enabled an appointment to be made in favour of persons who would not take in default of appointment, and, certainly, I am not satisfied that the execution of the power of appointment was not of itself sufficient to defeat the limitations in default of appointment contained in the testator's will, but it is not, in my opinion, necessary to decide this point, for I think that the interest of *F. Vizard* was altered by the exercise of the power. Under the will of the testator, supposing the power not to have been exercised, he took, upon the testator's death, a vested interest in one-fifth of a moiety of the property in question, but under the exercise of the power, his interest, as I apprehend, became contingent on his surviving the widow; for, according to the case of

(1) 9 Ves. 87. (2) 3 Mer. 667.

The Duke of Marlborough v. *Lord Godolphin* (1), the dispositions made by the widow, though imported into the will of the testator, would take effect only at her death, and there would be a lapse, therefore, if he died in the widow's lifetime, although he had survived the testator. The mere fact of his having in the result survived the widow could not, as I apprehend, alter this.

Looking at the case, therefore, upon the wills alone, I think that the Appellant's claim cannot be maintained, but then, a further point was raised on his behalf—that *F. Vizard* had obtained no order of discharge under the *Bankruptcy Act*, 1861; and it was insisted that by reason thereof his future estate, including, of course, what he became entitled to under the appointment, fell to be administered under the trusts of the deed. This argument was rested upon the 197th section of the Act, but that section, as I understand it, and as it appears to have been understood by the Lord Chancellor in *Ex parte Gibbons* (2), only operates to apply the law of bankruptcy to the deed as it stands, which it is to be observed was the operation given to it in *Topping* v. *Keysell* (3), cited for the Appellant, and by the then Lord Chancellor, in *Ex parte Morgan* (4), which the Appellant also cited. These cases do not go to the extent of attaching any other than the ordinary meaning to the words "estate and effects," contained in the deed; although, by applying the law of bankruptcy, they bring within the operation of those words property which would not otherwise fall within them. The future estate could, as I conceive, only be affected by the assigning debtor becoming bankrupt, and I can find nothing either in this section, or in any part of the Act, which can put him in this position, nor any provision which could entitle him to apply for a certificate of discharge under any of the provisions of the Act. The Appellant's case, therefore, in my opinion, fails upon this point no less than upon the former one, and I think, therefore, this appeal must be dismissed, but as my learned brother is not, I believe, of the same opinion, and the case is certainly one of some novelty and difficulty, I think it should be dismissed without costs.

(1) 2 Ves. Sen. 61.
(2) 13 W. R. 1001.
(3) 16 C. B. (N. S.) 258.
(4) 1 D. J. & S. 288.

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SIR J. L. KNIGHT BRUCE, L.J.:—

The agreement of my learned brother with the Vice-Chancellor disposes of the case, and it is, therefore, unnecessary for me to say more than that I agree that the dismissal of the appeal should be without costs.

Solicitors for *F. Vizard:* Messrs. *Vizard & Anstie.*

Solicitors for the Appellant: Messrs. *Meredith, Lucas, & Meredith.*

L. JJ. 1866 *Jul'y* 20.

COSENS *v.* BOGNOR RAILWAY COMPANY.

Vendor and Purchaser—Unpaid Purchase-money—Railway Company.

A railway company took land and made a railway thereon, and afterwards leased the railway to another company. Part of the purchase-money remained unpaid, and the landowner filed his bill against both companies, praying for payment of the money or an injunction to restrain them from using the land.

An order was made on motion, affirming the decision of *Stuart*, V.C., that the first company should pay the money, and in default that both companies should be restrained from using the land.

RICHARD *COSENS*, the Plaintiff in this case, had sold and conveyed to the *Bognor Railway Company*, partly under their compulsory powers and partly by an agreement, about five and a half acres of land near *Bognor;* the company had paid £1000, and there remained £500 due to the Plaintiff. The *Bognor Railway* had since been leased to the *London, Brighton,* and *South Coast Railway Company,* who were in possession. The money remaining unpaid, the Plaintiff filed his bill against both companies on the 19th June, and the Vice-Chancellor *Stuart,* on the 5th July, made an order upon motion, that the *Bognor Railway Company* should, before July 19, pay to the Plaintiff the £500, and in default, that an injunction be awarded to restrain both companies from running any engine over or otherwise using the Plaintiff's land until the hearing of the cause.

The *London, Brighton,* and *South Coast Railway Company* appealed.

There were two other appeals in similar cases against the same companies.

Mr. *Bacon*, Q.C., and Mr. *J. H. Taylor*, for the Appellants:—

A great part of the money has been paid, and the rest will be paid in due time, and this is not a case for extreme rigour. As against us, the Plaintiff cannot be in a higher position than an equitable mortgagee, and he never would get such a decree against us if he was an equitable mortgagee. We are ready to submit to an order to pay our rent as it accrues, to the Plaintiff in this suit and the other two Plaintiffs, or to a receiver. We shall not pay our lessor's debt, and the only result will be, that we shall shut up the railway, which we are working at a loss.

Mr. *Waller* appeared for the *Bognor Company*, but the Court refused to hear him, as that company had not appealed.

Mr. *Malins*, Q.C., and Mr. *C. Hall*, for the Plaintiff:—

The Plaintiff's land is taken, he cannot get his money, and has no other remedy. The lessee cannot be in a better position than his lessor, and the fact of these being railway companies can make no difference. *Hume* v. *Pocock* (1), was referred to.

Mr. *Bacon*, in reply.

SIR J. L. KNIGHT BRUCE, L.J., said, that the order might not be according to the ordinary practice of the Court nor was the case ordinary. He thought that the Court was not exceeding its power in allowing the order to stand.

SIR G. J. TURNER, L.J., said, that he could not concur, and thought that under the circumstances a receiver ought to be appointed or some other course adopted. The appeal would therefore be dismissed without costs.

Solicitors for the Plaintiff: Messrs. *Holmes & Impey*.
Solicitors for the Company: Messrs. *Faithfull, Son, & Coode*.

(1) *Ante*, p. 379.

L. JJ.
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July 3.

In re LONDON AND NORTH WESTERN RAILWAY ACT, 1861.

Ex parte CORPORATION OF LIVERPOOL.

Lands Clauses Consolidation Act, 1845, s. 69.—*Application of Compensation Money in Building.*

The corporation of *Liverpool* were empowered by a local Act to erect offices for the transaction of their public business, and to make rates for the purposes of the Act, and borrow money on the security of the rates. A railway company having taken other property of the corporation, not consisting of buildings, the corporation petitioned that the purchase-money which had been paid into Court, under the *Lands Clauses Consolidation Act*, might be applied in part payment of the expenses of erecting the offices:—

Held, by *Turner*, L.J. (*Knight Bruce*, L.J., dissenting), that such an application of the money ought not to be ordered, as it could only be directed where there were special circumstances shewing it to be beneficial to all parties interested.

THE *London & North Western Railway Company*, acting under the powers of one of their Acts, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, purchased for the purposes of the Act, certain pieces of land at *Walton-on-the-Hill*, near *Liverpool*, belonging to the corporation of *Liverpool*, for £17,553. The purchase-money was paid into court, and invested.

By the *Liverpool Improvement Act*, 1858, the corporation of *Liverpool* were authorized to take certain lands in *Liverpool*, and it was provided that they might appropriate such portion as they might think fit of the lands so taken, and which should not be required for a certain new street, or the widening of the existing streets mentioned in the Act, for the erection of buildings for the transaction of such of the public business of the corporation as they might from time to time think fit. And it was provided that they might from time to time sell, or let on building or other leases, all or any part of their present public offices: Provided that they should not sell or demise any of their present public offices, until they had completed other public offices in lieu thereof. It was further provided that the corporation might make rates upon all occupiers of property in the borough, and might

borrow on the credit of the rates, for the purposes of the Act, any sums not exceeding in the whole £130,000.

The corporation bought, and took a conveyance of, the lands which this Act authorized them to take, and appropriated a certain part of them, which was not required for the purposes of the streets, as a site for the new public offices. The value of the land so appropriated was estimated at £33,900, or more. The corporation had entered into contracts for the erection of part of the buildings to be erected, the whole being to cost about £80,000.

The corporation now applied that the moneys which had been paid into court, as above mentioned, might be applied towards the building of the new offices. The Master of the Rolls felt doubt as to the propriety of making such an order, and desired that the case might be mentioned to the Lords Justices.

Mr. *Baggallay*, Q.C., and Mr. *C. Stewart*, for the corporation:—

We submit that the proposed application of the money is an investment in land, under section 69 of the *Lands Clauses Act*, taking the word "land" in the wide sense given to it by the interpretation clause (sect. 3), though the branch of sect. 69 which relates to buildings, appears to throw some doubt on this. Most of the cases on the subject were either cases in which the only point discussed was whether the company was liable to pay the costs of a petition for having the money thus applied, or cases where the person seeking to apply the money in building had power to mortgage the estate to pay the expenses of building: *In re Buckinghamshire Railway Company* (1); *Re Incumbent of Whitfield* (2); *In re Partington's Trust* (3); *In re Lathropp's Charity* (4). In *Re Dummer's Will* (5), however, there were no special circumstances, yet the Court granted the application, and it is most desirable that some general rule should be laid down. In the present case the corporation, with the consent of the Lords of the Treasury, could mortgage to pay the expenses; an application of the fund in court in payment of the mortgage, would be clearly

(1) 14 Jur. 1065.
(2) 1 J. & H. 610.
(3) 11 W. R. 160.
(4) Law Rep. 1 Eq. 467.
(5) 2 D. J. & S. 515.

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within the terms of the Act, and what could thus be done indirectly, may be done directly.

Mr. *Benson Blundell*, for the company:—

The case is not within the provisions of the Act; *In re Partington's Trust* (1) did not turn on the *Lands Clauses Act*; the application was in the matter of a charity. In *Ex parte Shaw* (2) an order was made, but another report of the same case (3) shews that buildings had been taken. This case has been followed in ignorance of that circumstance: *In re Wigan Glebe Act* (4). *In re Rudyerd's Estate* (5) is against the jurisdiction; *Ex parte Melward* (6) was a case of injury to existing buildings; *Ex parte Davis* (7) was a case of pressing necessity, and can furnish no rule.

Mr. *Baggallay*, in reply.

Sir G. J. Turner, L.J.:—

My learned brother feels no difficulty about this case, but I must confess that I feel great difficulty. I do not say that money paid into Court under the provisions of the *Lands Clauses Consolidation Act* can never be applied in the way now proposed: the case before Lord *Eldon*, to which I referred on a former occasion (8), shews that such a thing may be done; but I think that it ought only to be done where there are special circumstances requiring it. We have been asked to lay down a general rule, but no general rule can be laid down to govern cases which depend on their own special circumstances. In the present case I cannot concur in making the order asked. The corporation, who are trustees of the corporate property, ask that a portion of it, which is producing income, may be laid out in the erection of buildings which will produce no income. This is not within the spirit of the section, which directs the money to be laid out in lands to be settled to the same uses as the lands taken; and it lies on the applicants to shew that this unproductive investment is beneficial to their *ces-*

(1) 11 W. R. 160.
(2) 4 Y. & C. Ex. 506.
(3) 10 L. J. (Ch.) 90.
(4) 3 W. R. 41.
(5) 6 Jur. (N. S.) 816.
(6) 27 Beav. 571.
(7) 3 De G. & J. 144.
(8) Ibid. 147.

tuis que trust. In the case before Lord *Eldon* there was urgent necessity, here there is none; nor is it even shewn that the proposed investment is beneficial to the objects of the trust on which the property is vested in the corporation. We cannot say that the application of this money in the proposed buildings will make the expense ultimately fall upon the same persons as if it were borrowed upon the security of the rates to be made in pursuance of the local Act. I think, therefore, that the order now sought must be refused.

SIR J. L. KNIGHT BRUCE, L.J.:—

The order cannot be made here without the concurrence of my learned brother. I take a different view from his, and in these circumstances no order can be made.

Solicitors for the Corporation of *Liverpool:* Messrs. *Wright & Venn.*

Solicitor for the Railway Company: Mr. *J. B. Batten.*

In re LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Ex parte FLOWER.

Lands Clauses Consolidation Act, ss. 80, 85—*Costs.*

A company took compulsory possession of certain parts of lands subject to leases, paying money into the bank, and giving a bond under section 85 of *The Lands Clauses Consolidation Act.* The purchase-money was afterwards ascertained by arbitration, but the payment of it into Court did not become necessary. The landowner incurred considerable costs about the apportionment of the rent, and presented a petition asking that they might be paid out of the deposit by the company:—

Held, that the 80th section applies whenever moneys are deposited in Court under the Act, whether under the earlier or the later sections; and an order of *Stuart*, V.C., for payment of the costs by the company, affirmed.

THIS was an appeal by the *London, Brighton, and South Coast Railway Company*, from an order of Vice-Chancellor *Stuart* directing them to pay certain costs.

L. JJ.
1866
In re LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *Ex parte* FLOWER.

Mr. *Flower* was the owner of an estate at *Battersea*, called the *Long Ridge Farm Estate*. In December, 1863, he entered into a contract, of the description usual in the neighbourhood of *London*, with two builders, for granting them leases of part of the ground at the rent of £294, the builders undertaking to build houses on the ground, and being entitled to separate leases of the houses when finished. In February, 1864, he entered into a similar contract as to another part of the estate, and in July, 1864, as to another part. In June, 1864, he granted to the builders leases of two houses, which they had finished on the property.

In February, 1865, the *London, Brighton, and South Coast Railway Company* served Mr. *Flower* with notice that they required, for the purposes of their Acts, the lands mentioned in the notice, comprising parts of the lands comprised in the above agreements and in one of the leases. Mr. *Flower* and the company could not agree as to the price, and in March, 1865, the company took possession under the 85th section of the *Lands Clauses Consolidation Act*, paying into Court £4100, being the amount of the valuation made by a surveyor, and giving Mr. *Flower* a bond in the penal sum of £4100, as prescribed by that section.

Part of the lands comprised in the building agreements and the lease being thus taken, it became necessary to have the rents apportioned under section 119 of the Act. An agreement not having been come to, the apportionments were settled by two justices as regarded the lands comprised in the building agreements, except the part comprised in the lease, and as regarded the premises in the lease, it was settled by agreement between Mr. *Flower*, the lessees, and the company. Mr. *Flower* incurred considerable costs about these apportionments, and he also incurred some costs in reference to a discussion about accommodation works to be made by the company.

The amount of compensation was ultimately referred to arbitration, and in March, 1866, the umpire awarded to Mr. *Flower* £33,800, with interest from March, 1865, and the costs of the arbitration.

The conveyance to the company was prepared, engrossed, and executed, and was ready to be handed over to the company on payment of the compensation. Mr. *Flower* included in his con-

veyancing costs the costs of the apportionment. The company elected to have the costs taxed, and it was agreed that in order to get the bill settled more speedily than could be done by obtaining an order for taxation, it should be settled by Mr. *Dax*. A correspondence took place relative to this reference, as to which it will be sufficient to say that the Court considered that it was not the intention of either party to refer anything more to Mr. *Dax* than the taxation of the conveyancing costs. The costs of the apportionment were disallowed by him, as not being costs payable under the 82nd section. The company insisted that this disallowance was final, and refused to complete the purchase, except on the terms, that upon their paying the purchase-money, interest, costs of arbitration, and the conveyancing costs as taxed by Mr. *Dax*, Mr. *Flower* should give them a consent to their receiving the £4100 out of Court without any deduction for the costs of the above apportionments.

Mr. *Flower* then presented a petition praying for a taxation of his costs of the apportionments, and of the discussion about accommodation works, and that the amount of such costs might be paid out of the £4100 in Court, and the residue of that fund paid to the company, or that the company might be ordered to pay the costs when taxed.

Vice-Chancellor *Stuart* made an order, directing the Petitioner's costs of and incident to the apportionments, the accommodation works, and the Petition, to be taxed, and ordering the company to pay them. The company appealed.

Mr. *Bacon*, Q.C., and Mr. *J. H. Taylor*, for the Appellants:—

These costs come neither under section 82, nor section 80. They cannot come under the former, for they are not conveyancing costs, they do not come under the latter, because the money here deposited was not compensation money, and it is only where the compensation money is paid into Court by reason of inability to convey, that the powers of section 80 arise: *Ex parte Buck* (1); that section being a part of the division of the Act from section 69 to section 80, both inclusive, and on a fair construction only applying to cases where money is deposited under the clauses

(1) 1 H. & M. 519.

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in that division. *Ex parte Stevens* (1) shews that there is no claim against this fund. But if these costs might otherwise be payable, there is no claim for them in the present case. Mr. *Dax* was in the position of an arbitrator, and his decision is final.

Mr. *Cole*, Q.C., and Mr. *Nalder*, for *Flower*:—

The intention of the parties was that Mr. *Dax* should settle the conveyancing costs as conveyancing costs. It was never intended to make him general arbitrator as to what costs the company should pay. He was quite right in striking out these costs, because they were not conveyancing costs: *Ex parte Buck* (2): but that does not affect our right to recover them under section 80. *Haynes* v. *Barton* (3) strongly lays down the reasonable rule that the company must pay all costs incident to the purchase of the lands, and these costs clearly are such.

Mr. *Bacon*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

12 Beav. 420

The Vice-Chancellor was right in point of principle, precedent, propriety, and substantial justice, in ordering the company to pay these costs, unless it can be shewn that under the Act of Parliament he had no jurisdiction to do so. Nothing has been read from the Act of Parliament, and no authority has been produced, shewing that he had not that jurisdiction under the 80th section of the Act, and I am of opinion that His Honour's order is clearly right.

SIR G. J. TURNER, L.J.:—

I am of the same opinion, and feel no doubt that the Vice-Chancellor had, under the 80th section, jurisdiction to order the company to pay these costs. The first question is, whether Mr. *Dax*'s award interposes any bar to the exercise of this jurisdiction, and I am of opinion that it does not, for it is clear to me, upon the correspondence, that it was not the intention of either party that Mr. *Dax* should take into consideration what costs should be paid by the company; all that was intended was, that he should tax the conveyancing costs, under which head these costs do not come.

(1) 2 Ph. 772. (2) 1 H. & M. 519, 523. (3) 1 Dr. & Sm. 483.

1 Jur. N.S. 699

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The case then turns entirely on the construction of section 80. Now there cannot be any doubt that these are costs incurred in consequence of the taking of the lands, and so far they are clearly within the section. But it was urged that the section did not apply at all, because the money was not deposited in Court under the prior sections, but under section 85. I am, however, clearly of opinion that the 80th section applies whether the money is deposited under the earlier or the subsequent clauses; the exception in that section appearing to me to remove whatever doubt there might otherwise have been on the point. Mr. *Dax's* award being out of the way, there is, in my opinion, nothing to take away the right of the landowner to receive these costs.

Solicitors for Mr. *Flower*: Messrs. *F. W. & W. Flower.*
Solicitors for the Company: Messrs. *Faithful, Son, & Coode.*

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L. JJ.
1866
July 26.

Title Deeds—Delivery of, out of Court to Tenant for Life.

A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of the leases to *Paris*. He afterwards, under an order of the Court, brought the whole of the title deeds and leases into Court, for the purposes of the suit. The purposes of the suit having been satisfied, and the portions raised by mortgage, he applied to have the title deeds and leases given up to him, which application was opposed by the mortgagees, and was refused by *Kindersley*, V.-C. :—

Held, by *Knight Bruce*, L.J., that as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mortgagees:

Per TURNER, L.J., *semble*, that the deeds ought to be delivered to him, on his giving sufficient security for their safe custody and production, and for returning them to Court when ordered.

Evidence referred to, not in the order under appeal, but in a previous order in the cause, cannot be read.

THIS was an appeal by Sir *J. A. Morris* from a decision of Vice-Chancellor *Kindersley*, who had refused to order certain title deeds and counterpart leases to be delivered out of Court to him.

Sir *J. A. Morris* in 1858 was tenant for life in possession of

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estates in *Glamorganshire*, under a settlement dated the 8th of June, 1819. Under a power contained in this settlement Sir *John Morris*, the deceased father of Sir *J. A. Morris*, had executed several deeds charging the estates with sums of money raisable after his death for the portions of his younger children, and limiting terms to trustees for the purpose of raising them. In the year 1858 Sir *J. Morris* having died, this suit was instituted by one of his daughters, and her husband and children, asking to have her portion raised, or in case the Court should be of opinion that the portionists took concurrently, then to have all the portions raised. On the 22nd of March, 1861, a decree was made directing all the portions to be raised by mortgage of the hereditaments comprised in the several terms of years limited by the deeds charging the portions. By certificate filed on the 29th of June, 1861, it was found that £15,000 was the sum necessary to be raised for the portions and costs.

On the 24th of July, 1861, an order was made, on the application of the Plaintiffs, for the production by Sir *J. A. Morris*, at the office of his solicitors, of the title deeds relating to the property to be included in the mortgage.

On the 29th of July, 1863, an order was made in this cause, and in two other causes, in which latter causes a receiver had been appointed who was in possession. By this order Sir *J. A. Morris* was let into possession of the estates on an undertaking that he should execute all such deeds as should be requisite for raising the amount directed to be raised by the above decree.

In September, 1863, a contract was entered into, subject to the sanction of the Court, between the Plaintiffs and proposed mortgagees for the advance of the £15,000 on mortgage.

On the 23rd of April, 1864, an order was made, on the application of the Plaintiffs, that Sir *J. A. Morris*, who was out of the jurisdiction, should leave at the office of his solicitors certain leases and counterparts of leases admitted by him to be in his possession.

On the 27th of February, 1865, the Chief Clerk certified that a mortgage for the £15,000 had been settled and approved, and also a deed appointing a receiver on behalf of the mortgagees. This receivership deed was of the usual description, empowering the receiver to enter and receive the rents on default being made in

payment of interest for a specified time. It was part of the arrangement of September, 1863, that the mortgagees were not to have possession of the title deeds, and the mortgage being only a mortgage of the terms, did not confer any right to such possession.

On the 15th of March, 1865, an order was made, on the application of the Plaintiffs, directing Sir *J. A. Morris*, or his solicitors, to produce on oath, and leave with the Clerk of Records and Writs, the title deeds, leases, and counterparts of leases, for the benefit of the parties interested therein.

On the 10th of April, 1865, the mortgage deed and receivership deed were executed. The money was afterwards paid into Court by the mortgagees. An order was subsequently made for the payment of the portions, and providing for costs.

In December, 1865, the Plaintiff took out a summons, asking that the deeds and documents in Court might be delivered out to the mortgagees. The summons was adjourned into Court. Vice-Chancellor *Kindersley*, on the 3rd of March, 1866, refused the application.

In June, 1866, Sir *J. A. Morris* moved that the title deeds and leases might be delivered out to him. The Vice-Chancellor refused the application, and Sir *J. A. Morris* appealed.

It did not appear in the evidence before the Court, but was admitted by counsel for Sir *J. A. Morris* at the bar, that he had on one occasion, before the leases were deposited in Court, taken a number of them with him to *Paris*. This fact, it was stated, had appeared in some of the earlier proceedings in the cause, and was the ground on which the Vice-Chancellor refused to order the delivery of the deeds to Sir *J. A. Morris*.

Mr. *Baily*, Q.C., and Mr. *A. Smith*, for Sir *J. A. Morris*, in support of the appeal motion:—

These deeds were brought into Court for the purposes of the suit. Those purposes have been satisfied, and the deeds ought to be given out to the person who brought them in: *Plunkett* v. *Lewis* (1). The retaining the leases in Court is especially inconvenient to the tenant for life, who has the management of the estate. The mortgagees have no right to the deeds.

(1) 6 Hare, 65.

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Mr. *W. W. Karslake*, for the mortgagees:—

We are not here asking that the deeds may be delivered to us, but we object to their being delivered to Sir *J. A. Morris*, on the ground that he cannot be depended on for their safe custody. The affidavit on which they were ordered into Court shews this.

[Mr. *Baily*:—That affidavit cannot be read. It is not entered in the order under appeal.

Mr *W. W. Karslake*:—It is entered in the order of 15th March, 1865.

SIR G. J. TURNER, L.J.:—You may read any previous order in the cause, but not evidence referred to in it, if not referred to in the order under appeal.

After this the admission above referred to was made.]

We have an interest in the deeds, and they ought to be retained in Court: *Webb* v. *Webb* (1); *Hicks* v. *Hicks* (2); *Brigstocke* v. *Mansel* (3). If it becomes necessary to put in force the receivership deed it will be most embarrassing to have the leases all in the hands of a hostile party.

Mr. *Baily*, in reply.

5 Ch D. 224

SIR J. L. KNIGHT BRUCE, L. J.:—

I cannot, without the consent of the mortgagees, concur in any order for delivery of these documents to a tenant for life who, on a former occasion, has, without any necessity, taken a number of them out of the jurisdiction.

SIR G. J. TURNER, L.J.:—

As my learned brother agrees with the conclusion of the Vice-Chancellor my opinion is immaterial, but I should have thought that as the objects of the suit are at an end, the deeds ought to be delivered to Sir *J. A. Morris* upon his giving security to be approved of by the Judge in Chambers for their safe custody upon

(1) 1 Dick. 298. (2) 2 Dick. 650.
(3) 3 Madd. 47.

the estate, for their production at all reasonable times, and for their return into Court if ordered.

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SIR J. L. KNIGHT BRUCE, L.J.:—

I do not object to such an order if the mortgagees consent to it.

The mortgagees having given their consent, the order was taken on the above footing.

Solicitors for Sir *J. A. Morris*: Messrs. *Horn & Murray*.
Solicitors for the Mortgagees: Messrs. *Parkin & Pagden*.

In re BUTLER.

L. JJ. 1866 *July* 27, 28.

Deceased Lunatic—Jurisdiction—Possession of Real Estate—Committee—Solicitor—Account.

A lunatic was found by the Court to be seised in fee of certain real estate, and certain persons were found to be his heirs. On his death intestate:—

Held, that the committee of the person who had been put by the Court into possession of certain part of the real estate, must deliver possession thereof to the heirs so found, but without prejudice to any question of title, and could not retain possession as an adverse claimant:

Held, that the Court could not order the committees of the person and estate to deliver possession of other part of the estate, which the committee of the person had taken possession of claiming adversely to the heirs, and that the committees were not accountable in lunacy for rents accrued since the death of the lunatic:

Held, also, that the Court could not, under its general jurisdiction, order a solicitor to account for rents so accrued and received by him as solicitor for the committee of the estate.

THIS was a Petition by the co-heiresses of a deceased lunatic, and contained statements to the following effect:—*Richard Fowler Butler*, the father of the lunatic, had a base fee (1) in a certain estate called the *Pendeford* estate, and was tenant for life of an estate called the *Barton Hall* estate, with remainder to his eldest son, *Richard Wynne Fowler Butler*, the lunatic, in tail, with remainder to his son by another wife, *Robert Henry Fowler Butler*, in

(1) This was the statement on the Petition, but the *Pendeford* estate was considered during the argument, and in his Lordship's judgment, as in the same position as the *Barton Hall* estate.

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tail, with remainders over. In 1849, shortly after *R. W. F. Butler* attained the age of twenty-one years, a disentailing deed was executed by him and his father, whereby the *Barton Hall* estate was settled on the father for life, with remainder to the eldest son, the lunatic, in fee, subject to charges.

In July, 1864, after the death of his father, *Richard Wynne Fowler Butler* was found a lunatic, and in 1865, *Henry Alsopp* was appointed committee of the estate, and *Robert Henry Fowler Butler* and his wife were appointed committees of the person. By a report, dated 30th November, 1865, the Master in Lunacy found that the Petitioners, *Sarah Fowler Butler*, *Mary Fowler Butler*, daughters of *R. F. Butler*, and *Elizabeth Tassie*, his granddaughter (all by his first wife) were co-heiresses of the lunatic, and that the lunatic was entitled to an estate in fee simple in the *Pendeford* estate, and to an estate in fee simple in the *Barton Hall* estate, subject to certain charges, and the Master submitted that it should be ordered that *R. H. F. Butler* and his wife should, as committees of the person of the lunatic, retain for his use the house and gardens called *Barton Hall*, and nine acres of land, part of the *Barton Hall* estate. This report was confirmed, and an order made accordingly.

On the 11th December, 1865, the lunatic died intestate.

Sarah Fowler Butler took out letters of administration of his estate, and *Sarah Fowler Butler*, and *Mary Fowler Butler* and *Elizabeth Tassie*, the other co-heiresses, now presented a Petition entitled in Lunacy and in Chancery, stating as above stated, and that *R. H. F. Butler* disputed the validity of the disentailing deed, and claimed both the estates as tenant in tail in remainder; and that *John Richardson* was employed by *Henry Alsopp*, the committee, as his solicitor, and had received the March rents of the estates and paid them to *R. H. F. Butler*; and the Petition prayed, among other things, that *Henry Alsopp* and *R. H. F. Butler* might be ordered to deliver to the Petitioners the possession of the *Pendeford* estate and *Barton Hall* estate; that *Henry Alsopp* might account for the rents payable in March last, and include them in his final account, and that the Master might apportion them; and that *H. Alsopp*, *R. H. F. Butler*, and *J. Richardson*, might be ordered to pay to the Petitioners the apportioned part of the rent.

The Petition now came on for hearing.

Mr. *G. M. Giffard*, Q.C., and Mr. *Bird*, for the Petitioners, contended that Mr. *Alsopp* and Mr. *R. H. F. Butler* came into possession of these estates as committees, and were bound now to take the directions of the Court before delivering up or retaining possession of them: *Ex parte Clarke* (1); *In re Fitzgerald* (2). As to Mr. *Richardson*, he was a solicitor, and bound to account under the general jurisdiction of the Court.

Mr. *Osborne*, Q.C., and Mr. *Swanston*, for Mr. *Alsopp*.

Mr. *Daniel*, Q.C., and Mr. *Rawlinson*, for *R. H. F. Butler*, said that a bill had been filed by him under which the dispute as to the title would be brought before the Court.

Mr. *Baggallay*, Q.C., and Mr. *Kay*, for Mr. *Richardson*.

Mr. *Bird*, in reply.

SIR J. L. KNIGHT BRUCE, L.J., said that in his opinion no case had been established for the interference of the Court, and that the Petition ought to stand over. He, however, deferred to the opinion of the Lord Justice *Turner*, being convinced that no injury could be done in the matter of title by interfering to the extent proposed.

SIR G. J. TURNER, L.J., after stating what appeared to be the facts of the case, continued:—

Then, as to the whole of these estates, except *Barton Hall*, and the land occupied with it, Mr. *R. H. F. Butler* was under no obligation whatever that I can see in respect of any duty contracted by him towards the lunatic's estate. He was tenant in tail in remainder if the disentailing deeds were not duly executed, and I can see nothing which would preclude him from his right, immediately upon the death of the lunatic, to assert his title as tenant in tail in remainder to these estates. In fact, he did assert his title immediately upon the death of the lunatic, and he claimed to be entitled to the whole of the *Pendeford* estate and the *Barton*

(1) Jac. 589. (2) 2 Sch. & Lef. 432.

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Hall estate, and I can find nothing whatever to restrict him from so doing. If he got into possession of these estates it was by virtue of his title, and not of any confidence reposed in him by the Court. And if these Petitioners assert their title, what was there to prevent them from giving notice to the tenants not to pay their rents to Mr. *R. H. F. Butler* or his agent, because a disentailing deed had been executed under which the lunatic became owner in fee, and they were therefore entitled as his co-heiresses at law, and they might have followed this up by filing a bill in equity for a receiver. Instead of doing this, they present this Petition, and ask that possession of these estates may be delivered to them. I cannot see any possible ground on which this Court, sitting in Lunacy, can give such a direction.

But as to *Barton Hall* and the nine acres, the case stands somewhat differently. Mr. *R. H. F. Butler* and his wife were appointed committees of the person of the lunatic, and were directed by the Court to retain possession of *Barton Hall* and the nine acres, for the convenience, comfort, and benefit of the lunatic. Mr. *R. H. F. Butler*, therefore, came into possession of this property not by virtue of any title in him as tenant in remainder, but by virtue of the order of this Court. Looking, then, to the cases of *Ex parte Clarke* (1), and *In re Fitzgerald* (2), I think that upon the death of the lunatic, Mr. *R. H. F. Butler* was bound not to set up his own title as against the heirs-at-law of the lunatic, who was found by the Master's Report to have been seised in fee of those estates. These two cases seem to establish that he was not entitled—having received possession from the Court as committee—to retain that possession in his character of tenant in tail in remainder. As to *Barton Hall*, therefore, we shall only be following the authority of Lord *Eldon* in *Ex parte Clarke*, which seems to have gone a little further than *In re Fitzgerald*, in saying that possession must be delivered up to the Petitioners, but, of course, without any prejudice to any possible question of title.

Another part of the prayer is, that Mr. *Alsopp*, the committee of the estate, may be charged with the sums which have been received by Mr. *Richardson*—the rents which accrued due in March last.

(1) Jac. 589. (2) 2 Sch. & Lef. 432.

Now, in the first place, so far as Mr. *Richardson* is concerned, this Court has nothing to do with it. This Court looks to the committee, and if he employs a person under him, the committee may be answerable to the Court, but the Court will never recognise the person who acts under the committee. The application so far as Mr. *Richardson* is concerned, seems to me altogether erroneous.

Then it is said that Mr. *Richardson* received these rents as agent of Mr. *Alsopp*, who must be answerable, and should have kept these rents in his own hands, as to which, and also as to the possession, the words of Lord *Redesdale* in the case of *In re Fitzgerald* are cited, and it is said that the committee ought to have come to the Court to ask for directions as to the delivery up of possession of the estates. I never heard of such an application. If any party thinks right to come to the Court and ask for delivery of the possession, which is the ordinary course taken, then the Court entertains the application, but I never heard that it was the duty of the committee to come to the Court in the first instance. On the contrary, in all the cases which come before us, where a lunatic dies seised of real estate, and the administrator comes for payment of the funds out of Court, we leave the question as to the real estate untouched, in order that any person may assert any title he may think himself to have in respect of the estates, and the passage cited from *In re Fitzgerald* as to the abandonment of possession as committee exactly applies to *Barton Hall*, but has no application to any other part of the case.

[His Lordship also decided against the Petitioners as to the other matters comprised in the Petition, which do not call for any report; and an order was made that possession of *Barton Hall* and the nine acres should be delivered to the Petitioners without prejudice to any question of title; except as to that, the Petition was dismissed with costs.]

Solicitors for the Petitioners: Messrs. *Young, Jones, & Co.*

Solicitors for Mr. *R. H. F. Butler*: Messrs. *Deane, Chubb, & Saunders.*

Solicitors for Mr. *Alsopp* and Mr. *Richardson*: Messrs. *Braikenridge & Sons.*

L. JJ.
1866
July 25.

DOWLING *v.* DOWLING.

Will—Gift by Implication to Issue.

A testator directed his residuary personal estate to be invested, "and the interest to be divided half-yearly between his four sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children":—

Held (reversing the decision of *Stuart*, V.C.), that each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue; and that there was no gift by implication to the children of any who might die leaving issue.

THIS was an appeal from a decree made by Vice-Chancellor *Stuart*, reported Law Rep. 1 Eq. 442.

The bill was filed for the purpose of obtaining a declaration of the rights of the persons interested under the will of *Richard Hoare Dowling*, dated the 18th of November, 1859. The testator thereby, after making certain devises and bequests, disposed of his residuary real and personal estate in the following terms:—

"That my freehold estates, and all other property, shall be disposed of as my executors may think best, and be added to and invested with my other personal property, either in railway debentures, or any other stock they may deem best, the interest therefrom to be divided half-yearly between my four sons above-named, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children."

The testator died on the 1st of May, 1860. His four sons referred to in the will, *R. H. Dowling*, *E. P. Dowling*, *C. H. Dowling*, and *S. H. Dowling*, were all still living; but *E. P. Dowling* having incumbered his share and become bankrupt, it became necessary to ascertain the extent of his interest under the will. The present bill was filed accordingly by *S. H. Dowling*, for that purpose. The Vice-Chancellor decided that the four sons took only an estate for life, with an estate by implication to the issue

living at their death, as joint tenants (1). From this decision the Plaintiff appealed.

When the case was opened before the Lords Justices, Lord Justice *Turner* remarked, that the Court had no jurisdiction to decide the rights of the parties in the event of any of the sons dying leaving issue, until the event had happened. The 50th section of the 15 & 16 Vict. c. 86, gave power to the Court "to make binding declarations of right, without granting consequential relief," but that had never been held to give power to the Court to make a declaration as to the rights of parties on a contingency which had not happened (2). If, therefore, the Court made any declaration in the present case, it must be confined to the present interest of the parties.

Mr. *Malins*, Q.C., and Mr. *Cracknall*, for the Plaintiff:—

The gift of the income to the sons is unlimited, and passes the capital; and there is nothing in the will to divest their interest unless they die without issue. There is no gift to the issue and if they take any interest, it must be by implication. But it is well settled that if there is a bequest to *A.* and if he die without issue, then over, there is no gift by implication to the issue. The Vice-Chancellor decided the case on the authority of *Ex parte Rogers* (3), which he considered to be still binding, notwithstanding subsequent decisions. But that case has always been considered to have been overruled by later authorities: *Ranelagh* v. *Ranelagh* (4); *Addison* v. *Busk* (5); *Neighbour* v. *Thurlow* (6); *Webster* v. *Parr* (7); *Sparks* v. *Restal* (8); *Salisbury* v. *Petty* (9).

Mr. *Aikin* (with whom was Mr. *Bacon*, Q.C.), for the children of *E. P. Dowling*:—

The interest is given to the sons half-yearly, which is more

(1) His Honour rested his judgment principally upon the case of *Ex parte Rogers* (2 Madd. 449) Registrar's Book A, 1815, p. 849, under the name of *Blackshaw* v. *Rogers*.

(2) See the note on this section in *Morgan's* Chancery Orders, 3rd Ed. p. 207.

(3) 2 Madd. 449.

(4) 12 Beav. 200.

(5) 14 Beav. 459; S. C. on appeal, 2 D. M. & G. 810.

(6) 28 Beav. 33.

(7) 26 Beav. 236.

(8) 24 Beav. 218.

(9) 3 Hare, 86.

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significant of a limited benefit than if it were given annually in the ordinary manner. There is a distinction made by the testator between the words "interest" and "share": *Wetherell* v. *Wetherell* (1).

We do not deny the application of the rule excluding a gift to the issue by implication in ordinary cases. But it is nowhere laid down that there cannot be a gift by implication to children if an intention to benefit them is shewn by the context: *Crowder* v. *Clowes* (2); *Wainewright* v. *Wainewright* (3); *Abbott* v. *Middleton* (4). Here the children of the testator's four sons were the objects of his bounty; the share of a son dying without issue being given over to the other sons "or their child or children." This distinguishes the present case from many of those cited on the other side. *Ex parte Rogers* (5) was decided on the authority of Lord *Thurlow's* judgment in *Harman* v. *Dickenson* (6), and is still good law. The subsequent cases which appear to overrule it were decided on the special words of each case.

Mr. *Malins*, in reply.

SIR J. L. KNIGHT BRUCE, L.J.:—

We have both made up our minds as to the true construction of this will. The four sons take absolute interests, subject to their being divested in the event of their dying without leaving issue. I am not satisfied that it would be proper at the present stage to go beyond that declaration.

SIR G. J. TURNER, L.J.:—

I am of the same opinion. The gift to the sons was an unlimited gift of the interest, passing the capital. The expression is, "the interest to be divided half-yearly between my four sons, and at the decease of either without lawful issue, such share to *revert* to the remainder;" which seems to assume that the share of each was considered by the testator to have become vested in the original persons to whom he had given it.

(1) 4 Giff. 51.
(2) 2 Ves. 449.
(3) 3 Ves. 558.
(4) 7 H. L. C. 68.
(5) 2 Madd. 449.
(6) 1 Bro. C. C. 91.

There is, therefore, in my opinion an absolute gift to the sons; but this absolute gift is subject to this condition, that upon the death of either of them without issue, the share is to revert to the remainder then living, or their child or children. It appears to me, upon the construction of the whole will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place; but so long as there are parents the children are to take nothing. The testator thought that in that case he had done enough for them, for the parents might provide for their own children.

I do not understand that there is a difference between us and the learned Vice-Chancellor as to the general rule of construction; but he has drawn an inference in favour of the children from the fact of the gift over being to the surviving sons or their children. But if the gift over is only to take effect in favour of the children if the parents are out of the way, no inference can be drawn from it in favour of the children of a son dying leaving issue as against the parents of such children. I am therefore of opinion that the general rule of construction must prevail, and that there is nothing in the context to take the case out of it.

The case of *Ex parte Rogers* (1), which has been so often commented on, cannot be considered a governing authority in the present case. Surely the mere fact of a testator giving over property in case there are no children, does not furnish any presumption on which this Court can act in favour of his giving it to the children, if there are any, as against their parents. The testator might well suppose they would be provided for from other sources, or that the parent would himself be able, by means of the gift, to provide for them.

In cases of gift by implication the Court has gone far enough, and the principle ought not to be extended. Perhaps it may be a question whether the Court would go as far as it formerly did in that direction. At all events the expressions in one will cannot govern the construction of wills which are couched in different language. With great deference, therefore, to the Vice-Chancellor, his order must be reversed; and it must be declared that each of the sons takes an absolute interest, subject to his share being

(1) 2 Madd. 449.

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divested in the event of his dying without issue living at his death, leaving it entirely open who will be entitled to the share in that event.

Solicitor for the Plaintiff: Mr. *O. Richards.*
Solicitor for the other parties: Mr. *Bodman.*

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Ex parte SAVIN. *In re* SAVIN.

Creditor's Deed—Bankruptcy Act, 1861, *ss.* 45, 192, 193—*General Order in Bankruptcy of 22nd May*, 1862—*Annulling Registration—Delay.*

2 Ch 365-369
4 Eq. 568
4 Ch 692
5 Ch 328, 330
10 Eq 57 & 9
14 Eq 216
16 Eq 386-9

A creditor's deed was registered on the 16th of March, under the 192nd section of the *Bankruptcy Act*, 1861. On the 16th of April a non-assenting creditor became aware that a number of addresses of creditors in the account which had been filed with it, according to the General Order of the 22nd of May, 1862, were imperfect, so that letters sent to them had been returned through the Dead-Letter Office. On the 31st of May, he gave notice to annul the registration, and the Commissioner made an order to that effect:—

Held, on appeal, that the time which had been allowed to elapse before making the application was fatal to it, and that the Commissioner's order must be discharged.

Per Turner, L.J.:—Whether the Order of 22nd May, 1862, does not go beyond the authority given by section 45 of the Act, in imposing conditions altering the effect of section 192—*quære.*

Per Turner, L.J.:—Whether the Court of Bankruptcy has jurisdiction to annul the registration of a creditor's deed—*quære.*

THIS was an appeal by Mr. *Savin*, the debtor, from an order of Mr. Commissioner *Goulburn*, directing the registration of a deed, under section 192 of the *Bankruptcy Act*, 1861, to be vacated and rescinded, and the certificate of registration to be vacated and cancelled, on the ground that the account delivered to the Chief Registrar under the deed was not in compliance with the General Order of the 22nd of May, 1862.

The deed in question was dated the 17th of February, 1866, and was expressed to be made between the debtor of the first part, three persons named as inspectors of the second part, and the creditors of the third part. The debtor thereby covenanted with the inspectors to render to them full accounts of his property, and

realize it under their directions, and deposit the money arising from it in such bank, and to such account, as they should direct, and agreed that he would execute such assignments of his estate as they should direct, until all his creditors were paid 20*s.* in the pound. The creditors and debtor agreed that the estate should be administered according to the principles of the bankrupt law, and gave powers to the inspectors for the purpose of its realization, giving them discretionary powers of advancing money out of the estate for the purpose of completing contracts, and powers to raise money by mortgages of the estate. The moneys were to be applied from time to time (after payment of expenses) in paying dividends to creditors as in bankruptcy, until they were paid in full. The creditors agreed to bring no actions, and it was stipulated that the deed might be pleaded in bar to any action.

This deed was registered on the 16th of March, 1866, and was accompanied by an account of creditors as required by the Order above referred to. The creditors were 505, and the total amount of debts due to them was upwards of £2,500,000, the debtor being a contractor carrying on business on a large scale. The creditors who applied to rescind the registration were two firms, one of which was an unsecured creditor for a sum of £1012 10*s.*, and claimed £473 as damages for breach of a contract; the other for £565. Neither firm had assented to the deed.

On the 16th of April, the solicitor of the above creditors, having previously obtained an office copy of the deed and account, inspected a number of letters which had been returned to the chief registrar through the Dead-Letter Office. Among them he found twenty-five notices which had been sent to creditors named in the account, and which were mostly indorsed, "not known," or "insufficient address." It was stated on affidavit, that with respect to many of these creditors, whose address in the account was simply "*Manchester*," it appeared on examination of the *Manchester Directory* that in some instances there were many persons in *Manchester* of the same name, and in other instances no person at all of the name. Four creditors were entered in the account without any addresses at all. As regards the securities held by secured creditors, in the column which, in the schedule to the above Order of the 22nd of May, 1862, is headed "Nature of Security," were entries in the

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following forms: "Railway Shares," which occurred above a hundred times, "*Cambrian Railway* Ordinary Shares," "*Cambrian* Preference Shares," "*Ebbw Vale* Shares," "Railway Shares, Debentures, &c.," "Landed Property," "Railway Shares and Debentures," "Railway and other Shares," "Real Estate, and Slate Quarry Shares." The value or estimated value of the security was in every case entered in the proper column, but nothing more was given as to its nature than some one of the above entries.

On the 31st of May, the creditors above referred to served a notice of motion that the registration of the deed might be vacated or rescinded, and the certificate of registration recalled and cancelled.

The motion was heard on the 22nd and 27th of June, by Mr. Commissioner *Goulburn*, who, on the 2nd of July, made the following order, "That the registration of the said deed of arrangement made pursuant to the 192nd and 193rd sections, of the *Bankruptcy Act*, 1861, and the rules and orders of this Court dated the 22nd of May, 1862, which registration was made on the 16th day of March, 1866, shall be, and the same is, hereby vacated and rescinded, and that the certificate of the Chief Registrar issued in pursuance of the 198th section of the said Act be recalled and cancelled, on the ground that the account delivered to the Chief Registrar of this Court with the above-mentioned deed, was not in compliance with the rules and orders of this Court of the 22nd day of May, 1862, in the following particulars: 1. That the residences of the persons alleged to be creditors of the said *Thomas Savin* are not sufficiently set forth therein, and as to some of such creditors that their residences are not set forth at all; and 2. That the nature of the security held by the several persons alleged to be creditors either wholly or partially secured, is not sufficiently stated in such account."

Mr. *Savin* now moved to discharge this order.

Mr. *De Gex*, Q.C., and Mr. *Beresford*, for the appeal motion:—

Supposing the application to annul the registration to be one which ought to have been granted of course if made earlier, it comes too late, a vast business having been carried on under the deed from the middle of March to the end of May without the

applicants taking any step to disturb it. The order ought to be discharged on that ground alone. But we further contend that the Commissioner had no jurisdiction to make such an order: *Ex parte Page, In re Neal* (1); *Ex parte Ness* (2). The order does not say that if the form has not been complied with the registration is bad; moreover, the order would have been *ultra vires* if it had done so, for no addition could lawfully be made to the requisitions of sect. 192. *Rex* v. *Justices of Leicester* (3), shews the distinction between statutes which give specific orders, and those which merely direct. We admit that the list is inaccurate; but how can a man who owes £2,500,000 give an accurate list of his creditors? What is he to do if he does not know their addresses? No one pretends to say that any real inconvenience has accrued. Besides, if the deed is bad it is no protection: *Lloyd* v. *Harrison* (4).

Mr. *Bacon*, Q.C., and Mr. *J. Napier Higgins*, on the other side:—

If this contention is allowed, a bankrupt can always defeat his creditors. The Act is plain, and the rules are to be read as part of it, and are clear and precise, and with a very good and intelligible object, and not having been complied with, the Court ought to declare the registration void. Are the creditors to be bound, and the debtor not? If there was an accidental error, or an occasional omission, your Lordships might give leave to amend; but here the omission of addresses has been quite systematic, and it is impossible to send the requisite letters and notices. The creditors will not be hurt if the deed is set aside, and we have a right to have that done.

Mr. *De Gex*, in reply:—

Ilderton v. *Jewell* (5); *Leigh* v. *Pendlebury* (6), shew that there would be no mischief done by treating registration as incapable of being annulled.

SIR J. L. KNIGHT BRUCE, L.J.:—

In this case—a case of some importance—several points have

(1) 1 D. J. & S. 283.
(2) 5 C. B. 155.
(3) 7 B. & C. 6.
(4) 6 B. & S. 36; 13 W. R. 602.
(5) 14 C. B. (N. S.) 665.
(6) 15 C. B. (N. S.) 815.

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been argued, upon which neither my learned Brother nor myself consider it necessary to give an opinion. For the purpose of the present controversy, I think that the registration is open to objection, and that it was competent to the learned Commissioner, in point of law, to decide against its validity. When I say competent, I do not mean to say, or to have it inferred, that in my opinion he was bound to give effect to the objection. I do not say there was absolute invalidity; but there was, I repeat, the competency or power to decide in favour of the validity of the objection made to the sufficiency of the registration; though I think that it was not incumbent on the Commissioner so to decide. Now, in that view of the case, the time allowed to elapse before bringing the objection before his Honour, was, I think, of great materiality. The time was about ten weeks. During that period, in an estate of this description, much that is very material may have happened, and in all probability has happened, and I apprehend that those who intended to avail themselves of the invalidity, or possible invalidity, of the registration, were bound to bring the objection forward much sooner than they did. I think that the time which has been allowed to elapse is a sufficient answer to the application, and, therefore, respectfully, and fully sensible of the value of the learned Commissioner's experience and opinion upon a question of this description, I think, with deference to him, that in this case I should not have acted upon the view of the invalidity of the registration, but should have declined to interfere with it, and should have decided that matters ought to be left as they are. I think, therefore, speaking, I repeat, with great deference and respect to the opinion of the learned Commissioner, that the order should be discharged, and that the registration should remain.

SIR G. J. TURNER, L.J.:—

Some points of the very greatest importance have been raised in this case. First, whether the account rendered by the debtor was sufficient, which leads back to the question whether the Order of May, 1862, was an Order warranted by the statute? Secondly, whether the learned Commissioner had or had not a power to order the registration of this deed to be cancelled? And, thirdly, whether

the statute gives power to enable an amendment to be made of the account which has been rendered?

I should not think it right to give an opinion upon any of those points unnecessarily; and it seems to me, as well as to my learned brother, that the time which was permitted to elapse before the application was made to the Commissioner is sufficient to dispose of the whole case. I do not give a concluded opinion on any of the other questions. On the question whether there was power to prescribe such a form of account as was prescribed by the General Order of May, 1862, I will merely observe that if the 45th section of the Act is to be considered as merely extending to modal alterations in the practice, forms, and proceedings of the Court, it must be a most serious question whether it authorizes modal alterations to be made which alter the effect of other provisions contained in the Act of Parliament, whether, in fact, under the 45th section, a modal alteration could be introduced which has the effect of adding another condition to the 192nd section, which prescribes the mode and the requisites of registration.

With reference to the power to cancel, it may be quite true that, as the learned Commissioner says, every Court has the power of setting right errors which have occurred in its own practice, or through the non-observance by its officer of any particular rules. This case does not stand wholly upon that jurisdiction, because the statute has, in the present case, enacted that particular effects shall follow upon the act done by the officer. The question is, whether, the statute having prescribed those particular effects, it is competent to the Court, in the exercise of that jurisdiction which every Court must possess over the acts of its own officers, to undo those acts, notwithstanding the provisions of a statute prescribing the effect of those acts. The question of the right to amend is one of minor importance, and I do not think it necessary to say anything upon it.

The point on which, in my judgment, the case rests is delay. This deed was registered on the 16th of March. The nature of the case is, that there are debts due from this debtor to the amount of more than £2,500,000, and there are enormous works in progress by the debtor, which this deed, as I understand it, authorized the

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inspectors to carry on, and to borrow money for the purpose of carrying on; and it must be taken that as early as the middle of March the party applying to cancel the registration had the full means of acquiring a copy of the deed, and knowing all the provisions that were contained in it, and, among others, the provisions for carrying on this business, and borrowing money for the purpose of carrying it on. The complaint before us is this, that there is not a sufficient description, in the account which was rendered by the debtor, of the places of abode of the creditors, or of the securities which were held by them. Now, the applicant had the same power to obtain a copy of the account as a copy of the deed, and as early, therefore, as the middle of March, he had the means of ascertaining what defects there were in that account. He must be taken, therefore, to have known, as early as the middle of March, everything which is now brought before us, every objection which arises upon the account as to the insufficiency of the description of the creditors, and as to the insufficiency of the statement of the securities. With that knowledge he rests till the 31st of May, allowing the proceedings under the deed to go on during the whole of that period, eight weeks at least, without, according to the evidence before us, having given any intimation of his intention to dispute the deed, or to question anything that was done under it, and even, according to the statements made in his behalf at the bar, the most that can be said is, that he did, three weeks before the 31st of May, intimate to the solicitor on the other side that he intended to question the deed. Even if he is not to be considered as fixed with a knowledge of the deed, and of the account, and of all the details of it which are brought before us, and which constitute the objection, as early as the middle of March, this at least is clear, that on the 16th of April, according to the evidence before us, he knew that the Registrar of the Court had forwarded letters to a variety of the creditors who are mentioned in the deed, and that those letters had been returned through the Dead-Letter Office.

Now, in a transaction of this description relating to concerns of the enormous extent of those which are involved in this deed, I think it is not going too far to say that it was the duty of this applicant, at all events, either to go to the Court of Bankruptcy at

once to make the application which he ultimately made on the 31st of May, or, at all events, to give notice of his intention to do so. Giving him the benefit of the supposition that he did not know anything till the 16th of April, and giving him the benefit of the three weeks' notice stated at the bar (not upon the evidence before us), to have been given, the delay was too great, it was too much for him to lie by and to wait for a whole month. It appears to me, therefore, there has been such delay as to make it impossible to sustain the order, and upon that ground I think the order ought to be discharged.

Solicitors for the Appellant: Messrs. *Tilleard, Son, Godden, & Holme.*

Solicitors for the Respondents: Messrs. *Harrison & Lewis.*

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APPEAL ON ADJOURNED INQUIRY.

Where the Vice-Chancellor had rejected evidence on an inquiry in Chambers adjourned into Court; and the party producing the evidence appealed, the Lords Justices doubted whether there could be such an appeal, and whether he ought not to wait for the certificate, and then move to vary; and they directed the application to stand over and to come on with any motion to vary the certificate. *Rhodes* v. *Rhodes.* 483

APPEAL ON MATTER OF DISCRETION.

See DISCRETION, 1, 2.

APPLICATION, CONDITIONAL.

See CONTRIBUTORY, 3, 4.

APPLICATION FOR SHARES.

See CONTRIBUTORY, 1.

APPOINTED PROPERTY, EFFECT OF COMPOSITION ON.

A fund stood limited by will, upon trust for a person for life, remainder to all or such one or more of the children or issue of the testator's deceased brother *A.*, in such shares and in such manner as the tenant for life should appoint, and in default of appointment to the children of *A.* equally. *F.*, one of the children of *A.*, assigned all his property to a trustee for his creditors, by a deed in the form of Schedule D. to the *Bankruptcy Act*, 1861. This deed was duly registered, but *F.* never obtained an order of dis-

charge. After this the tenant for life appointed the fund by will to the children of *A.* equally. All the children of *A.* living at the testator's death survived the tenant for life, so that *F.* took the same share under the appointment as he would have taken in default of appointment:—

Held, by *Turner*, L.J., affirming the decision of *Stuart*, V.C. (*Knight Bruce* L.J., giving no opinion), that the deed did not pass after-acquired property, that *F.'s* interest, in default of appointment, was defeated by the appointment which gave him an interest liable to be defeated by lapse, and which, therefore, must be considered a new interest, and that, consequently, the share of *F.* did not pass to the trustee.

Whether an appointment by deed to *F.*, of the same share as he would have taken in default of appointment, would not also have given him a new interest—*quære*. *In re Vizard's Trusts.* 588

APPOINTMENT.

See APPOINTED PROPERTY, EFFECT OF COMPOSITION ON.

APPOINTMENT IN COURT.

See DISCRETION, 1.

ARREST.

See CREDITOR IN BANKRUPTCY.

ASSETS, DIVISION OF.

See PARTNERSHIP.

ATTESTATION.

See EXECUTION OF COMPOSITION DEED.

AUCTION.

See PUFFERS.

AWARD.

See SPECIFIC PERFORMANCE OF AWARD.

AWARD, JURISDICTION TO RECTIFY.

An award was made in the year 1765 by Inclosure Commissioners, acting under the authority of an Act of Parliament, whereby they apportioned certain lands and a rent-charge between the rectors of *B.* and curates of *U.* The Plaintiff, who was now curate of *U.*, complained that this allotment was beyond the power of the Commissioners, and prayed that the award might be rectified, and a fresh partition made:—

Held, reversing the decision of the Master of the Rolls, that on the true construction of the Act the Commissioners had power to make the allotment; but *semble*, that if they had acted *ultra vires*, this Court would have had no power to rectify the award. *Bateman* v. *Boynton.* 359

BANKRUPT.

See DEBTS WITHOUT EXPECTATION OF PAYMENT, 1.

BANKRUPT, ALLOWANCE TO.

See ALLOWANCE TO BANKRUPT.

BANKRUPT EXECUTOR AND TRUSTEE.

See RECEIVER, 2.

BANKRUPT LAW CONSOLIDATION ACT, 1849.

The 101st section of the *Bankrupt Law Consolidation Act*, 1849, is not repealed by the 96th section of the *Bankruptcy Act*, 1861. *Ex parte Harris. In re Ash.* 469

See OFFICIAL ASSIGNEES, ALLOWANCES TO.

SECTIONS 100, 260.

See PRODUCTION IN BANKRUPTCY.

SECTION 112.

See CREDITOR IN BANKRUPTCY.

BANKRUPTCY.

See ALLOWANCE TO BANKRUPT.
ANNULLING ADJUDICATION.

BANKRUPTCY—(*continued*).

See Appointed Property, Effect of Composition on.
Bankrupt Law Consolidation Act, 1849, s. 101.
Creditor in Bankruptcy.
Damages, Assessment under Composition.
Debts without Expectation of Payment, 2.
Execution, Leave to Issue, 1, 2.
Fraudulent Assignment.
Joint Estate.
Majority of Creditors.
Official Assignees, Allowances to.
Petitioning Creditor's Debt.
Production in Bankruptcy.
Production of Mortgage.
Receiver, 2.
Registration of Deed.
Statement of Debts.
Suspending Bankruptcy, Effect of.

BANKRUPTCY ACT, 1861.

See Official Assignees, Allowances to.

Section 18.

See Petitioning Creditor's Debt.

Sections 45, 192, 193.

See Annulling Registration.

Section 93.

See Statement of Debts.

Section 96.

See Bankrupt Law Consolidation Act, 1849, s. 101.

Section 136.

See Suspending Bankruptcy, Effect of.

Section 153.

See Damages, Assessment of, under Composition.

Section 159.

See Debts without Expectation of Payment, 1, 2.

BANKRUPTCY ACT, 1861—(*continued*).

Section 192.

See Execution of Composition Deed.
Execution, Leave to Issue, 1, 2.
Majority of Creditors.
Registration of Deed.

Section 197.

See Production of Mortgage.

Section 200, Schedule D.

See Appointed Property, Effect of Composition on.

BANKRUPTCY APPEAL.

On an appeal in bankruptcy no evidence which was not before the Commissioner can be used without leave, except to shew what took place at the hearing before him. *In re Lascelles.* 127

BANKRUPTCY, GENERAL ORDER IN, of 22nd of May, 1862.

See Annulling Registration.

BEER-SHOP, COVENANT NOT TO USE AS.

The owner of a freehold house had entered into a covenant with the Plaintiff, who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards let to the Defendant as tenant from year to year, without express notice of the covenant:—

Held (affirming the decision of *Wood*, V.-C.), that although the covenant might not at law run with the land, the Defendant was bound by it in equity.

The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant, as to the purchaser of a greater interest.

Per TURNER, L.J. :—A covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beer-shop, does not run with the land. *Wilson* v. *Hart.* 463

BILL, LEAVE TO FILE.

See VOLUNTARY WINDING-UP, 2. WINDING-UP.

BILLS, NEGOTIATION OF, BY OFFICIAL LIQUIDATOR.

See SET-OFF IN WINDING-UP, 1.

BOUNDARY OF MINE.

See SPECIFIC PERFORMANCE.

BUILDING.

See COMPENSATION MONEY, APPLICATION OF, IN BUILDING.

CAIRNS' ACT.

See DAMAGES.

CALL.

See FI. FA. BY OFFICIAL LIQUIDATOR.

CALL TO ADJUST RIGHTS.

See PAID-UP SHAREHOLDER, 2.

CALLS, SET-OFF AGAINST.

See SET-OFF IN WINDING-UP, 2.

CAMPBELL'S ACT.

See LIMITATION OF SHIPOWNER'S LIABILITY.

CANADA.

See COPYRIGHT OF ALIEN.

CESTUI QUE TRUST.

See PARTIES.

CHARITY.

The Court has power to, alter from time to time the scheme of a charity which has been settled by a previous decree of the Court, if the circumstances require it.

The Court refused to permit the renewal of leases of the lands of a charity on fines, although the practice had been sanctioned by a scheme settled by the award and decree of the Court, and had been acted on since under the direction of the Court.

The custom of an ancient charity had been that the lessees of the charity lands should have renewals of leases on easy and beneficial terms. The Court nevertheless in settling a scheme refused to permit leases to be granted except at rack rent: but directed that in granting fresh leases, regard should be had to the claims of any lessees who had expended money on the faith of renewals. *Attorney-General* v. *St. John's Hospital, Bath.* 92

COLLEGE VISITOR.

See JURISDICTION.

COLLISION.

See LIMITATION OF SHIPOWNER'S LIABILITY.

COLONY.

See COPYRIGHT OF ALIEN.

COMMITTEE.

See DECEASED LUNATIC.

COMPANIES ACT, 1862.

SECTION 35.

See PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

SECTIONS 38, 74.

See PAID-UP SHAREHOLDER, 1.

SECTIONS 38, 74, 133, ART. 9.

See PAID-UP SHAREHOLDER, 2.

COMPANIES ACT, 1862—(*continued*).

SECTION 69.

See SECURITY FOR COSTS.

SECTION 95.

See SET-OFF IN WINDING-UP.

SECTION 124.

See WINDING-UP, NOTICE OF APPEAL IN.

SECTION 153.

See WINDING-UP, SALE PENDING.

SECTIONS 161, 147, 138, 165.

See VOLUNTARY WINDING-UP, 2.

SECTION 165.

See WINDING-UP.

SECTIONS, 176, 180, 199.

See VOLUNTARY WINDING-UP, 1.

COMPANY.

See CONTRIBUTORY, 2, 3, 4.
PAID-UP SHAREHOLDER, 2.
FORFEITURE OF SHARES, 1, 2.
PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.
SET-OFF IN WINDING-UP, 2.
VOLUNTARY WINDING-UP, 1, 2.
WINDING-UP.
WINDING-UP, CLAIM BY LESSOR IN.

COMPENSATION MONEY, APPLICATION OF IN BUILDING.

The corporation of *Liverpool* were empowered by a local Act to erect offices for the transaction of their public business, and to make rates for the purposes of the Act, and borrow money on the security of the rates. A railway company having taken other property of the corporation, not consisting of buildings, the corporation petitioned that the purchase-money which had been paid into Court, under the *Lands Clauses Consolidation Act*, might be applied in part payment of the expenses of erecting the offices:—

Held, by *Turner*, L.J. (*Knight Bruce*, L.J., dissenting), that such an application of the money ought not to be ordered, as it could only be directed where there were special circumstances shewing it to be beneficial to all parties interested. *In re London and North Western Railway Act*, 1861. *Ex parte Corporation of Liverpool.* 596

COMPOSITION.

See APPOINTED PROPERTY, EFFECT OF COMPOSITION ON.

COMPOSITION DEED.

See ANNULLING REGISTRATION.
DAMAGES, ASSESSMENT OF, UNDER COMPOSITION.
EXECUTION, LEAVE TO ISSUE, 1, 2.
MAJORITY OF CREDITORS.
PRODUCTION OF MORTGAGE.
REGISTRATION OF DEED.

CONCEALED WILL.

See EAST RIDING REGISTRY ACT.

CONDITIONAL APPLICATION FOR SHARES.

See CONTRIBUTORY, 3, 4.

CONDITION AS TO TITLE.

The Plaintiff agreed to sell to the Defendant all his estate, right, and interest in certain lands, the Plaintiff only to produce a title from *A. B.* (the last owner) to himself. It appeared that the Defendant knew that *A. B.* was one of four supposed owners of the property, and was anxious to buy up such title as he had in order to get rid of his opposition to a bill in Parliament:—

Held, (affirming the decree of *Stuart*, V.-C.), that the Defendant was not at liberty to shew *aliunde* that *A. B.* had no title, and that the Plaintiff was entitled to specific performance.

The mere assertion by the vendor

that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract. *Hume* v. *Pocock.* 379

CONDITIONS OF SALE.

See PUFFERS.

CONDUCT OF PROCEEDINGS.

See EXECUTOR, CONDUCT OF PROCEEDINGS BY.

CONFIDENTIAL RELATION.

See UNDUE INFLUENCE.

CONSIDERATION.

See RELEASE ON GIVING UP SECURITY. VOLUNTARY SETTLEMENT.

CONSIDERATION, WANT OF.

A tenant in tail, expectant on the death of a tenant for life who was insolvent, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the assignee of the tenant for life, agreeing that the assignee should have the same right to the timber as if he had actually cut it, on a past day named, which was prior to the death of the tenant for life; and the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although both the tenant in tail and the agent of the assignee were ignorant of the fact:—

Held, that the agreement was founded on a mistake, and was without consideration, and the Court refused to enforce it. *Cochrane* v. *Willis.* 58

CONTRIBUTORY.

1. A director of a railway company signed the articles of association as a holder of twenty-five shares, but applied for fifty shares, which was the qualification of a director under the articles. No allotment of shares was made:—

Held, varying the decision of the Master of the Rolls, that he was a contributory for twenty-five shares only.

A resolution was passed at a meeting of directors, reciting a list of shareholders, in which the Appellant, who was a director, was put down for fifty shares. The Appellant was not present at the meeting, and denied all knowledge of the resolution, although he was present at the next subsequent meeting:—

Held, in the absence of proof that the minutes of the previous meeting were duly read and confirmed at the subsequent meeting (which it appeared was not always done), that the Appellant was not bound by the insertion of his name for fifty shares. *In re Llanharry Hematite Iron Company. Tothill's Case.* 85

2. The directors of a joint stock company offered their reserved shares to shareholders and the executors of deceased shareholders, in proportion to the amount of their original shares:—

Held, reversing the decision of *Kindersley*, V.-C., that executors who accepted shares must be put upon the list of contributories in their own right, and not in their representative character.

The fact that the new shares were offered to, and accepted by, the executors in their representative character, and that the directors had no power to offer the shares to them in any other character, did not preclude the executors from being personally liable as between them and the other contributories. *In re Leeds Banking Company. Fearnside and Dean's Case. Dobson's Case.* 231

3. Where the power of allotting shares is vested by the deed of settlement of a company in the directors, they have no right to delegate such power.

Therefore, where a shareholder who

had been offered some reserved shares, accepted them conditionally, but the board of directors did not expressly assent to such conditional acceptance, but resolved that the shares remaining undisposed of should be allotted at the discretion of two of the directors and the manager; and the manager subsequently wrote the shareholder that the shares he had accepted had been allotted to him.

Upon application by the shareholder to have his name removed from the list in respect of such shares:—

Held, affirming the decision of *Kindersley*, V.-C., that the board of directors could not delegate their powers; that if the shares had been allotted it was *ultra vires*, and, therefore, that the shareholder's name must be removed from the list in respect of such shares. *In re Leeds Banking Company. Howard's Case.* 561

4. *S.*, a railway carriage builder, had an interview with the secretary of a company which had just been formed for dealing in carriages, as to *S.* taking shares, and paying the calls in rolling stock. He then sent in an application requesting the directors to allot him 2000 shares, all future calls to be paid "in rolling stock, as arranged." The directors returned no answer, but put his name on the register of shareholders for 2000 shares. He never received notices, nor was treated as a shareholder:—

Held, affirming the decision of *Wood*, V.-C., that there was no concluded contract by *S.* to take shares, and that he was not a contributory. *In re Rolling Stock Company of Ireland. Shackleford's Case.* 567

See Fi. Fa. by Official Liquidator.
Forfeiture of Shares, 1, 2.
Paid-up Shareholder, 1, 2.
Winding-up, Sale Pending.

CONTRIBUTORY ALSO A CREDITOR.

See Set-off in Winding-up, 2.

COPPER WORKS.

See Nuisance, Coming to.

COPYRIGHT ACTS.

See Copyright of Alien.

COPYRIGHT OF ALIEN.

An alien friend residing temporarily in any part of the British dominions and during the time of such residence publishing in *England* a work of which he is the author, acquires a copyright under the 5 & 6 Vict. c. 45. And this is the case although he may be residing in a British colony, with an independent Legislature, under the laws of which he is not entitled to copyright. *Low* v. *Routledge.* 42

CORPUS, COSTS OUT OF.

See Costs under Trustee Relief Act.

COSTS.

See Interest payable by Purchaser.
Lands Clauses Act, 3.
Paid-up Shareholder, 1.
Production in Bankruptcy.

COSTS UNDER TRUSTEE RELIEF ACT.

Where a trust fund has been paid into Court under the *Trustee Relief Act*, the tenant for life will have his costs of a Petition for payment to him of the dividends, out of the *corpus*. *In re Turnley.* 152

COVENANT RUNNING WITH THE LAND.

See Beer-Shop, Covenant not to use as.

CREDITOR IN BANKRUPTCY.

The word "creditor" in the Bankruptcy Acts applies only to creditors who are such at the time of the bankruptcy, and who have a right to come in and prove their debts under it.

Therefore, a protection order under the Bankruptcy Act of 1849, s. 112, does not protect from arrest by a creditor whose debt accrued subsequently to the adjudication. *In re Poland.* 356

CREDITOR'S DEED.

See EXECUTION OF COMPOSITION DEED.

CREDITORS, MAJORITY OF.

See MAJORITY OF CREDITORS.

CROSS BILL.

See RES JUDICATA.

CUMULATIVE SENTENCE IN BANKRUPTCY.

See DEBTS WITHOUT EXPECTATION OF PAYMENT, 1.

DAMAGE, EXTENT OF.

See DAMAGES.
LIGHT IN TOWNS, 1, 2.
LIGHT.

DAMAGES.

There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill; and there is no difference in this respect between injury to easements and to other rights. But the Court will only grant such an injunction to prevent extreme or very serious damage.

Under Sir *H. Cairns'* Act (21 & 22 Vict. c. 27), it is discretionary with the Court whether it will award damages or leave the Plaintiff to obtain them at law.

Under Mr. *Roll's* Act (25 & 26 Vict. c. 42), where a Plaintiff has at the time of filing his bill no ground for equitable relief, the suit is improperly brought into equity, within the meaning of the Act, and the Court will leave the question of damages to a court of law. *Durell* v. *Pritchard.* 244

DAMAGES, ASSESSMENT OF, UNDER COMPOSITION.

Section 153 of the *Bankruptcy Act*, 1861, enabling a creditor to have unliquidated damages assessed, applies to arrangements by deed as well as to bankruptcies.

Where a creditor has proceeded at law against the debtor after the registration of a trust deed, and has recovered damages, he will not be allowed to come in under the trust deed and have the damages assessed under section 153. *In re Penton.* 158

DEBT CONTRACTED AFTER ADJUDICATION.

See CREDITOR IN BANKRUPTCY.

DEBTS WITHOUT EXPECTATION OF PAYMENT.

1. The Court can only inflict on a bankrupt one of the penalties specified in section 159 of the *Bankruptcy Act*, 1861.

Under the circumstances a bankrupt was not considered to have contracted a debt without any reasonable or probable ground of being able to pay the same, though he obtained goods on credit whilst insolvent, and soon afterwards sold them for less than their cost price. *In re Marks.* 334

2. A bill accepted for the accommodation of another person may in bankruptcy constitute a debt contracted without any reasonable or probable ground of expectation of being able to pay the same. *Ex parte Mee.* 337

DEBTOR AND CREDITOR.

See RELEASE BY GIVING UP SECURITY.

DEBTOR PETITIONING AGAINST HIMSELF.

See STATEMENT OF DEBTS.

DECEASED LUNATIC.

A lunatic was found by the Court to be seised in fee of certain real estate, and certain persons were found to be his heirs. On his death intestate:—

Held, that the committee of the person who had been put by the Court into possession of certain part of the real estate, must deliver possession thereof to the heirs so found, but without prejudice to any question of title, and could not retain possession as an adverse claimant:

Held, that the Court could not order the committees of the person and estate to deliver possession of other part of the estate, which the committee of the person had taken possession of claiming adversely to the heirs, and that the committees were not accountable in lunacy for rents accrued since the death of the lunatic:

Held, also, that the Court could not, under its general jurisdiction, order a solicitor to account for rents so accrued and received by him as solicitor for the committee of the estate. *In re Butler.* 607

DECREE IN EQUITY.

See PETITIONING CREDITOR'S DEBT.

DECREE AS TO LIGHT, FORM OF.

See LIGHT.
LIGHT IN TOWNS, 2.

DEED.

See PRODUCTION OF MORTGAGE.

DEEDS, RIGHT TO.

See TITLE DEEDS.

DELAY.

See ANNULLING REGISTRATION.

DELAY "FROM ANY CAUSE WHATSOEVER."

See INTEREST PAYABLE BY PURCHASER.

DELIVERY OF DEEDS TO TENANT FOR LIFE.

See TITLE DEEDS.

DEMURRER.

See RES JUDICATA.

DEVASTAVIT, LIABILITY OF MARRIED WOMAN FOR.

See WIFE EXECUTRIX.

DEVISE BY VENDOR TO INFANT.

See INTEREST PAYABLE BY PURCHASER.

DIRECTORS, FRAUD BY.

See WINDING-UP.

DIRECTOR, QUALIFICATION OF.

See CONTRIBUTORY, 1.

DISCRETION.

1. Where a Judge in the exercise of his discretion has appointed an official liquidator, the Court of Appeal will not disturb the appointment.

The official liquidator may be appointed at the hearing of the Petition for winding-up. *In re London, Bombay, and Mediterranean Bank.* 525

2. Where a Judge in the exercise of his discretion has appointed an official liquidator, the Court of Appeal will not disturb the appointment. *In re International Contract Company.* 523

DIVISION OF ASSETS.

See PARTNERSHIP.

DIVORCE ACT, s. 5.

See DIVORCE COURT, ORDER OF.

DIVORCE COURT, ORDER OF.

A fund was standing in Court in trust for a married woman for life, and after her death for her husband for life. The marriage was dissolved by decree of the Divorce Court, and an order was made by that Court that the settled fund should be held in trust for the persons who would be entitled if the wife were dead. On the Petition of the husband an order was made by the Court of Chancery directing that the income should be paid to him. *Pratt* v. *Jenner*. *Ex parte Jenner*. 493

DISSOLUTION.

See PARTNERSHIP.

DISSOLUTION OF COMPANY.

See WINDING-UP, CLAIM BY LESSOR IN.

DOMICIL.

See SUCCESSION DUTY.

DOUBTFUL TITLE.

A testator gave real estate to trustees and their heirs, upon trust that they and their heirs should stand seised thereof during the life of *W. C.*, and also until the testator's debts and legacies were paid, upon the trusts thereinafter mentioned, namely upon trust to set and let the same, and apply the rents in payment of his debts and legacies, until they were all paid, and thenceforth to pay the rents to *W. C.* during his life, and after the decease of *W. C.*, and the payment of all the debts and legacies the testator devised the estate to the heirs of the body of *W. C.* After the debts and legacies had been paid, the trustees conveyed the legal estate for the life of *W. C.* to him, it being assumed that they had only an estate *pur autre vie*. *W. C.* then suffered a common recovery. *W. C.* having afterwards contracted to sell the estate, the Master of the Rolls held that the trustees did not take the whole fee, but only a fee determinable on the payment of the debts and legacies and the death of *W. C.*; and the rule in *Shelley's Case* did not apply, and that the title was bad.

Per KNIGHT BRUCE, L.J.—*Semble*, the trustees took the entire fee, and the title was good.

Held, by both their Lordships, that as the view that the trustees did not take the entire fee had been acted on for many years, and the Master of the Rolls was of opinion that they did not, the title ought not to be forced on a purchaser. *Collier* v. *McBean*. 81

EASEMENT.

See LIGHT.
LIGHT IN TOWNS, 1.
PRESCRIPTION.

EASEMENTS, INJURY TO.

See DAMAGES.

EAST RIDING REGISTRY ACT.

Under the *East Riding Registry Act*, 6 Anne, c. 35, *Held*, affirming the decree of the Master of the Rolls, that no protection is given to devisees under a will which has not been discovered by them till the expiration of six months after the death of the testator, and where, in consequence, no memorial of the will or of the impediment preventing its registration has been registered by them within the time prescribed by the Act.

A title which has been registered can only be affected by clear and distinct notice, amounting in fact to fraud.

Whether a registered equitable mortgagee, without notice, is affected by the notice of his mortgagor—*Quære*. *Chadwick* v. *Turner*. 310

ENROLMENT, VACATING.

1. A decree dismissing a bill was

taken to the registrar on Friday by the Plaintiff's solicitor to be passed and entered, and by arrangement was left with the Defendant's solicitor to pass and enter on behalf of the Plaintiff. The Plaintiff's solicitor asked for it at the office on the following Wednesday, but it was not to be found, the fact being that the Defendant's solicitor had obtained it from the office; and the Plaintiff's solicitor could not hear of it till Saturday, when he was informed by the Defendant's solicitor that he had taken it from the entering clerks, and enrolled it:—

Held, that as the decree ought not to have been delivered to any one except the solicitor who left it, and the irregularity had delayed the Plaintiff in proceeding to an appeal, the enrolment ought to be vacated. *Fryer* v. *Davies*. 390

2. Where one party had enrolled a decree as quickly as the practice of the Court would allow, his knowledge that the other party intended to appeal:—

Held, not a ground for vacating the enrolment. *Hill* v. *Curtis*. 425

EQUITABLE MORTGAGEE.

See East Riding Registry Act.
Lands Clauses Act, 2.
Suspending Bankruptcy, Effect of.

EQUITY TO A SETTLEMENT.

Where a wife is entitled in equity to a settlement out of a fund, the Court will, in the absence of special circumstances, direct one-half of the fund to be settled on the wife and her children, with ultimate remainder in default of issue to the husband. Order of *Stuart*, V.-C., affirmed. *Spirett* v. *Willows*. 520

ESTATE OF TRUSTEES.

See Doubtful Title.

EVIDENCE.

See Trustee, Principle of Selection.

EVIDENCE ON BANKRUPTCY APPEAL.

See Bankruptcy Appeal.

EVIDENCE, REJECTION OF.

See Appeal on Adjourned Inquiry.

EXCEPTIONS IN BANKRUPTCY.

See Joint Estate.

EXECUTION.

See Fi. Fa. by Official Liquidator.

EXECUTION OF COMPOSITION DEED.

The third condition of the 192nd section of the *Bankruptcy Act*, 1861, requires the execution by the debtor of a creditor's deed to be attested by a solicitor; but a power of attorney to execute such a deed need not be so attested. *In re Fulcher*. 519

EXECUTION, LEAVE TO ISSUE.

1. A composition deed appearing to be *bonâ fide*, and containing a provision that anything therein contained, not authorized by the Act, should only be binding on the creditors who executed, will not be invalid, because it contains provisions for payment of some small extra costs, for verification of debts, for excluding creditors who do not prove in time, or for administering the estate as on a bankruptcy.

Where a creditor disputes the validity of a composition deed:—*Semble*, that it is a proper course for him, instead of issuing execution at his own risk, to apply to the Commissioner for leave to do so, and that the Commissioner has jurisdiction to give such leave. *Re Tresidder*. 21

2. Where a creditor who had not assented to a composition deed allowed proceedings to go on under the deed

for eleven months, and then applied to have the registration of the deed rescinded, or for leave to issue execution, the Court refused to interfere, and left the creditor to his legal remedy. *Ex parte Banfield.* 154

EXECUTOR, CONDUCT OF PROCEEDINGS BY.

A decree having been made for the administration of personal estate at the suit of the residuary legatees, it was found necessary that proceedings should be taken in equity against a person who had had dealings with the testatrix. The executor was willing to conduct them, and no case of misconduct was established against him. An order of *Stuart*, V.-C., giving the Plaintiffs liberty to take proceedings in the name of the executor was discharged on appeal, and the executor directed to take them. *Harrison* v. *Richards.* 473

EXECUTOR BECOMING BANKRUPT.

See RECEIVER, 2.

EXECUTORS ACCEPTING SHARES.

See CONTRIBUTORY, 2.

EXECUTRIX.

See WIFE EXECUTRIX.

FALSA DEMONSTRATIO.

See SPECIFIC PERFORMANCE.

FI. FA. BY OFFICIAL LIQUIDATOR.

When the official liquidator desires to issue a writ of *fi. fa.* against a contributory who has not paid a call, he must obtain an order for payment to himself under the 38th Order of the 11th of November, 1862. *In re Leeds Banking Company.* 150

FINES.

See CHARITY.

FORECLOSURE OR SALE.

See LANDS CLAUSES ACT, 2.

FOREIGN DOMICIL.

See SUCCESSION DUTY.

FOREIGN SUIT.

A British subject, entitled to real and personal estate, both in *England* and in the *Netherlands*, died domiciled in *England*, leaving a will by which he gave to trustees, upon certain trusts, all his property here and abroad; but as to his foreign property so far only as he could dispose of it according to the law of the country where it was situate. A decree was made in *England* for the administration of his estate. Subsequently, one of his children instituted proceedings in the *Netherlands*, for the administration of both his real and personal estate in that country. *Stuart*, V.-C., made an order restraining the prosecution of the pending proceedings in the *Netherlands*, and the taking any other proceedings there as to the personal estate.

On appeal from this order,

Held, by *Knight Bruce*, L.J., that the order ought not to have absolutely restrained the Appellant from carrying on the pending proceedings in the *Netherlands;* but ought to have left her at liberty to carry them on as to the real estate—if she could do so without proceeding as to the personal estate; but *held* by *Turner*, L.J., that the order ought not to be thus varied, the Appellant not having shewn that the proceedings could be carried on as regarded the real estate alone.

Per TURNER, L.J.: Whether proceedings in the *Netherlands*, even as to

the real estate only, ought not to be restrained—*Quære. Hope* v. *Carnegie.* 320

FORFEITURE OF SHARES.

1. The directors of a company made an arrangement with a shareholder who wished to retire from the company, that on payment by him of a sum of money, his shares should be declared forfeited for non-payment of a call which had been made. The money was paid and the shares transferred to the company. Twelve years afterwards the company was wound up, and two years after that an application was made to place the shareholder on the list of contributories:—

Held, reversing the decision of the Master of the Rolls, that the shareholder ought to be placed on the list, as the arrangement was not within the power of the directors, and was a fraud on the other shareholders.

The shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty. *In re Agriculturists' Cattle Insurance Company. Stanhope's Case.* 161

2. At a meeting of a company it was resolved that a large call should be made, and that any shareholders who wished to retire, and accepted the terms proposed before a certain day, might pay a part of the call, and that then their shares should be forfeited for non-payment of the rest. A shareholder accepted these terms after the day fixed, and his shares were declared forfeited by the directors:—

Held, reversing the order of the Master of the Rolls, that though the shareholder might have been able to retire if he had accepted before that day, the directors had not power under the circumstances to declare the shares forfeited, and that he remained a shareholder. *In re Agriculturists' Cattle Insurance Company. Stewart's Case.* 511

FORM OF DECREE.

See LIGHT.
LIGHT IN TOWNS, 2.

FORM OF SETTLEMENT.

See EQUITY TO A SETTLEMENT.

FORMÂ PAUPERIS, APPEAL IN.

When a party has obtained the common order to sue *in formâ pauperis* at any stage of the suit, it will carry him through all subsequent stages; and no special order is required to enable him to appeal without payment of a deposit. *Drennan* v. *Andrew.* 300

FRAUD.

See UNDUE INFLUENCE.

FRAUDS, STATUTE OF.

See PART PERFORMANCE, 1, 2.

FRAUDULENT ASSIGNMENT.

An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts.

In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors.

Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent. *In re Colemere.* 128

FREESTONE.

See MINERALS.

FUND IN COURT.

See DIVORCE COURT, ORDER OF.

FUTURE RENT.

See WINDING-UP, CLAIM BY LESSOR IN.

GENERAL ORDER IN BANKRUPTCY OF 22 MAY, 1862.

See ANNULLING REGISTRATION.

GENERAL ORDER OF 11 NOV. 1862, Rule 38.

See FI. FA. BY OFFICIAL LIQUIDATOR.

GIFT BY IMPLICATION TO ISSUE.

A testator directed his residuary personal estate to be invested, "and the interest to be divided half-yearly between his four sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children":—

Held (reversing the decision of *Stuart*, V.-C.), that each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue; and that there was no gift by implication to the children of any who might die leaving issue. *Dowling* v. *Dowling*. 612

GUARDIAN, APPOINTMENT OF.

1. Three applications were made at the same time as to the guardianship of infants. One that Mrs. *H.*, their maternal grandmother, might be appointed guardian; another for the appointment of Mrs. *A.* and Mrs. *B.*, their paternal aunts, both married women; and another for the appointment of *C.*, a friend of the family. An order having been made by *Stuart*, V.-C., for appointing Mrs. *B.* sole guardian:—

Held, on appeal, that though the discretion of the Judge as to the choice of a guardian ought not to be interfered with, except on very strong grounds, yet that this order ought to be discharged, and Mrs. *H.* and *C.* appointed guardians on these grounds:—that the appointment of a married woman to be sole guardian was improper; that the Vice-Chancellor had not approved of Mrs. *A.*, which had a bearing on the propriety of appointing Mrs. *B.*, who was acting with her; that the father had in his lifetime shewn great confidence in Mrs. *H.*, and allowed the children, who had very little intercourse with his relations, to live much with her; and that their mother, whose wishes, though she had no power to appoint guardians, ought to be taken into consideration, had made a will purporting to appoint Mrs. *H.* and *C.* guardians. *In re Kaye*. 387

2. A father, being a beneficed clergyman of the Church of *England*, appointed his widow and a clergyman guardians of his infant children. The widow became a member of the sect of *Plymouth Brethren*. On the application of the other guardian, the Court, affirming the decisions of *Stuart*, V.-C., ordered the children, who were respectively in their fifteenth and twelfth years, to be brought up as members of the Church of *England*, and restrained their mother from taking them to a chapel of the *Plymouth Brethren*.

In such a case the Court will pay no regard to the fact that the father was well affected towards dissenters, and associated with them; nor will it be influenced by the wishes of the infants upon the subject. *In re Newbery*. 263

HEIR-AT-LAW, INQUIRY AS TO.

A testator gave real and personal estate to *R. B.* for life, remainder to his sons successively in tail, remainder to his own right heirs. *R. B.* died without issue, and claiming to be the testator's heir-at-law, disposed of the testator's property by will. After his death the testator's sole next of kin filed a bill to recover the personal estate from *R. B.'s* executors, who were also the personal representatives of the testator, alleging that the testator left no heir-at-law, or that if he did it could not be ascertained who was such heir-at-law, and that there was an intestacy as to the personal estate. *R. B.'s* executors entered into evidence depending

on a long and complicated pedigree to prove that *R. B.* was heir. The evidence did not establish this, but shewed that the testator must have left an heir. The Plaintiff did not go into evidence:—

Held, affirming the decree of the Master of the Rolls, that the Plaintiff was not entitled as of right to an inquiry whether there was an heir-at-law, but that the Court would at the hearing determine upon the evidence, whether there was ground for such an inquiry, and that as the evidence sufficiently shewed that there must have been an heir-at-law, the bill must be dismissed. *De Beauvoir* v. *Benyon* 212

HOUSE, PART OF.

The Plaintiff was owner and occupier of a house and six acres of meadow land on the west of the *Edgware Road*. He had a large family, and the ground he had being insufficient for the horses and cows which he kept for their use, he bought six and a quarter acres on the other side of the road, the nearest point being distant 120 yards from his entrance-gate. At the nearest point of this land were a cow-house, loose box, and a cottage which was occupied by his grooms, because he had no accommodation for them on his own side of the road, and he for a number of years occupied the land for the purpose of feeding the horses and cows requisite for his establishment:—

Held, by *Turner*, L.J., affirming the decision of *Wood*, V.-C., *dubitante Knight Bruce*, L.J., that the six and a quarter acres could not be considered part of the house within the meaning of the 92nd section of the *Lands Clauses Consolidation Act*.

Per TURNER, L.J.:—The word "house" in the above section, includes all that would pass by a devise of the house; but that does not include land which is not necessary for the convenient use and occupation of the house, but only for the personal use and convenience of the owner and occupier. *Steele* v. *The Midland Railway Company*. 275

HUSBAND AND WIFE.

See DIVORCE COURT, ORDER OF. WIFE EXECUTRIX.

HUSBAND'S DEVASTAVIT, LIABILITY FOR.

See WIFE EXECUTRIX.

INCLOSURE ACT.

See AWARD, JURISDICTION TO RECTIFY.

INCOMPLETE GIFT.

See PAROL DECLARATION OF TRUST.

INCREASED RENT.

See PART PERFORMANCE, 1.

INCREASING NUISANCE.

The sewage of a town had for many years been drained by commissioners acting under a local Act of Parliament into a stream passing through the Plaintiff's land, which was beyond their district, without perceptibly polluting it. But for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity. Decree of the Master of the Rolls restraining the commissioners from draining the town into the stream so as to pollute the water to the injury of the Plaintiff affirmed.

Assuming that a prescriptive right could be acquired of draining the sewage into the stream to the injury of the Plaintiff, it could only be acquired by the continuance of a perceptible amount of injury for twenty years.

Although the fact of prospective nuisance is not in itself a ground for

the interference of the Court, yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase.

Observations on the weight to be attached to the conclusions of scientific witnesses. *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners.* 349

INFANT.

See GUARDIAN, APPOINTMENT OF, 1, 2.

INFANT, DEVISE BY VENDOR TO.

See INTEREST PAYABLE BY PURCHASER.

INFLUENCE.

See UNDUE INFLUENCE.

INJUNCTION.

See DAMAGES.
FOREIGN SUIT.
INCREASING NUISANCE.
LIGHT.
LIGHT IN TOWNS, 1, 2.
NUISANCE, COMING TO.

INJUNCTION AGAINST RAILWAY COMPANY.

See RAILWAY COMPANY.

INJURY COMPLETED.

See DAMAGES.

INQUIRY.

See LIGHT.

INQUIRY, APPEAL ON.

See APPEAL ON ADJOURNED INQUIRY.

ISSUE, IMPLIED GIFT TO.

See GIFT BY IMPLICATION TO ISSUE.

INTEREST, PAYABLE BY PURCHASER.

S. W. contracted to sell a moiety of an estate to *G.*, the purchase to be completed on the 24th of June, 1854, and if, "from any cause whatever," the purchase should not be completed on that day, the purchaser to pay interest. Just before the 24th of June, the other part owner set up a claim to the entirety, and refused to produce the deeds. *G.* applied at distant intervals to know when the vendor would complete, and never expressed a wish to rescind. In 1857, *S. W.* filed a bill for partition, and died in March, 1858, leaving a will made in 1856, by which he devised his estates to infants, two of whom were his heirs. In July, 1861, *S. W.'s* executors revived the partition suit, and in January, 1862, *G.* was made a party by amendment, pursuant to an arrangement made at his request in May, 1861. In July, 1862, a decree for partition was obtained and the certificate made in July, 1863. *G.*, who had, in June, 1854, when the dispute arose with the co-owner, given notice that he would not pay interest, but had ever since employed the purchase-money in his trade, refusing to pay interest, *S. W.'s* executors, in 1864, filed a bill against him and the infant devisees for specific performance, and the Master of the Rolls decreed specific performance, and ordered *G.* to pay interest from June, 1854, and to pay all the Plaintiff's costs:—

Held, on appeal, that the circumstances were not such as to exempt the purchaser from payment of interest according to the contract.

But *held*, that the purchaser ought not to have been ordered to pay the whole costs, for that if there had been no dispute about the interest a suit would have been necessary on account of the devise to the infants, and in such a suit the purchaser, in the opinion of the Lord Justice *Knight Bruce*, would have been entitled to his costs; and, in the opinion of the Lord Justice *Turner*,

would in the circumstances of the case neither have received nor paid costs.

Per TURNER, L.J.:—A vendor is ordinarily bound to take the steps within his power to complete his contract, and heavy damages would be given for default; but he is not bound to enter into litigation with an adverse claimant in order to perfect his title. *Williams* v. *Glenton.* 200

JOINT ESTATE.

C. entered into an agreement with *R.* that *R.* should buy and sell goods on behalf of *C.*, and that the business should be carried on as *R. & Co.*, *R.* being paid by a salary and a percentage on profits. The business was managed by *R.*, but *C.* had bought goods for it. Each became bankrupt:—

Held, that the book debts and stock-in-trade of *R. & Co.*, were joint estate of the two.

On an appeal coming on for further consideration, after the Commissioner has made a certificate in pursuance of a reference, the finding may be disputed without having been excepted to. *In re Rowland & Crankshaw.* 421

JOINT GRANTEES OF PATENT.

Where a patent for an invention is granted to two or more persons in the usual form, each one may use the invention without the consent of the others.

As to the rights of such joint grantees to the profits made by granting licences.—*Quære. Mathers* v. *Green.* 29

JOINT STOCK COMPANY.

See VOLUNTARY WINDING UP, 1.

JURISDICTION.

The Lord Chancellor, representing the Queen, as visitor of a college, on the Petition of the college sanctioned the appropriation of part of the revenues of the college to the augmentation of the stipend of a professorship which was on the same foundation as the college. *In re Christ Church.* 526

See DECEASED LUNATIC.

JURISDICTION TO RECTIFY AWARD.

See AWARD, JURISDICTION TO RECTIFY.

JURISDICTION AFTER SUSPENSION OF BANKRUPTCY.

See SUSPENDING BANKRUPTCY, EFFECT OF.

LACHES.

See EXECUTION, LEAVE TO ISSUE, 2.
FORFEITURE OF SHARES, 1.
INCREASING NUISANCE.
PART PERFORMANCE, 1.
STATEMENT OF DEBTS.
SUBSTITUTION OF TENANT.

LANDLORD AND TENANT.

See BEER-SHOP, COVENANT NOT TO USE AS.
PART PERFORMANCE, 1.
SUBSTITUTION OF TENANT.
WINDING UP, CLAIM BY LESSOR IN.

LANDS CLAUSES ACT.

SECTION 9.

1. The provisions of the 9th section of the *Lands Clauses Act*, as to the purchase of lands from persons under disability, must be strictly complied with.

Therefore, when a railway company agreed with a charitable corporation, having no power to sell except under the *Lands Clauses Act*, for the purchase of a piece of land, and no certificate had been obtained from two surveyors of the adequacy of the price, the Court, affirming the decision of the Master of the Rolls, refused to decree specific performance of the agreement.

Semble, where one of the parties to a contract proves that he understood the

agreement in a different sense to the other, the Court will refuse to decree specific performance of the agreement, without considering whether the Defendant's construction be reasonable or not. *Wycombe Railway Company* v. *Donnington Hospital.* 268

SECTIONS 18, 85, 87, 108, 110, 124.

2. A railway company requiring land, paid a sum of money into Court, and gave the usual bonds to the landowner and to his mortgagees by deposit, and took possession of the land. The company proceeded with the inquiry into the amount of compensation as against the landowner, the mortgagees being aware, though without formal notice, of the inquiry, but taking no part in it. The compensation awarded was less than the amount in Court, and was not sufficient to pay the debt due to the mortgagees, and a suit being instituted by them, the sum in Court was transferred to that suit, and ordered to stand as a security under the *Lands Clauses Consolidation Act.* On the cause being heard:—

Held (reversing the decision of *Stuart*, V.-C.), that the mortgagees had no lien on the sum in Court:

Held also, that they were not bound by the inquiry, and were, as equitable mortgagees, entitled, in default of payment, to an assignment by the company and the landowner of the land comprised in their security:

Held also, that the 124th section of the Act did not apply. *Martin* v. *London Chatham and Dover Railway Company.* 501

SECTION 69.

See COMPENSATION MONEY, APPLICATION OF IN BUILDING.

SECTIONS 80, 85.

3. A company took compulsory possession of certain parts of land subject to leases, paying money into the bank, and giving a bond under section 85 of *The Lands Clauses Consolidation Act.* The purchase-money was afterwards ascertained by arbitration, but the payment of it into Court did not become necessary. The landowner incurred considerable costs about the apportionment of the rent, and presented a petition asking that they might be paid out of the deposit by the company:—

Held, that the 80th section applies whenever moneys are deposited in Court under the Act, whether under the earlier or the later sections; and an order of *Stuart*, V.-C., for payment of the costs by the company, affirmed. *In re London, Brighton, and South Coast Railway Company. Ex parte Flower.* 599

SECTION 92.

See HOUSE, PART OF.

LAND TRANSFER ACT (25 & 26 VICT. C. 53).

The Judge must hear an application for an order to the Registrar of Title, though made in the first instance *ex parte*. *In re Drew's Estate.* 126

LAPSE.

See APPOINTED PROPERTY, EFFECT OF COMPOSITION ON.

LATERAL OBSTRUCTION.

See LIGHT IN TOWNS, 1.

LEASE.

See BEER-SHOP, COVENANT NOT TO USE AS.
PART PERFORMANCE, 1.
SUBSTITUTION OF TENANT.
WINDING UP, CLAIM BY LESSOR IN.

LEASES UNDER 1 WM. 4, C. 65.

Where lands stand limited in fee defeasible on certain events happening, the Court has power to grant leases of the lands under 1 Wm. 4, c. 65, if all persons who would be entitled on any of the events happening are before the Court. *In re Clark.* 292

LEASES, RENEWABLE.

See CHARITY.

LEGACY.

See SUCCESSION DUTY.

LIFE ESTATE OF LUNATIC.

See LUNACY REGULATION ACT, s. 125.

LIGHT.

The owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained.

Where an injunction was granted to restrain the interruption of an ancient light, the Court gave the Defendant leave to apply in order to ascertain whether any building which he might propose to erect would cause such an interruption. *Yates* v. *Jack.* 295

See DAMAGES.

LIGHT IN TOWNS.

1. Where a house is in a populous town, the Court will take that fact into consideration in estimating the damage done by obstructing an ancient light. The Court will not restrain the erection of a building merely because it deprives an ancient window of some portion of light; but will do so when the obstruction is such as to interfere with the ordinary occupations of life. A lateral obstruction may be such a nuisance as to be restrained. *Clarke* v. *Clark.* 16

2. The Court will not grant an injunction to restrain the erection of a building on account of its obstructing the Plaintiff's light, unless the Plaintiff can shew that he will sustain substantial damage. If he cannot do this, his ground of application to the Court fails, and no inquiry will be granted as to damages, and the bill will be altogether dismissed; but without prejudice to an action at law. Decree of *Kindersley*, V.-C., reversed. *Clarke* v. *Clark* (Law Rep. 1 Ch. 16) followed. *Robson* v. *Whittingham.* 442

See DAMAGES.

LIMITATION OF SHIPOWNER'S LIABILITY.

The *Merchant Shipping Repeal Act*, 1854, which repeals all Acts and parts of Acts inconsistent with the *Merchant Shipping Act*, 1854, has not the effect of importing into Lord *Campbell's* Act the limitation contained in the *Merchant Shipping Act*, 1854, of a shipowner's liability for loss of life occasioned by collision, so as to keep that limitation in force notwithstanding the repeal of the last-mentioned Act, but such liability is now subject only to the limitations contained in the *Merchant Shipping Act*, 1862.

Appeal from the Master of the Rolls dismissed. *Glaholm* v. *Barker.* 223

LUNACY.

See DECEASED LUNATIC.
LUNACY REGULATION ACT, s. 125.

LUNACY REGULATION ACT, s. 125.

The 125th section of the *Lunacy Regulation Act*, which enables the Court to sell, for building purposes, land of which the lunatic is seised in fee-simple, does not apply to estates of which the lunatic is tenant for life; and where the income is more than sufficient for the maintenance of the lunatic, the Court is not authorized to sell real estate under the 116th section. *In re Corbett.* 516

MAJORITY OF CREDITORS.

A deed of arrangement with creditors may be registered if assented to by a majority in number representing three-fourths in value of the creditors, without deducting the amount of the se-

curities held by such creditors as are secured. *In re Stark.* 150

MALA FIDES.

See UNDUE INFLUENCE.

MANDATORY INJUNCTION.

See DAMAGES.

MARRIAGE.

See PART PERFORMANCE, 2.

MARRIED WOMAN GUARDIAN.

See GUARDIAN, APPOINTMENT OF, 1.

MERCHANT SHIPPING ACTS.

See LIMITATION OF SHIPOWNER'S LIABILITY.

MINE.

See PRESCRIPTION.

MINE, MISTAKE OF BOUNDARY.

See SPECIFIC PERFORMANCE.

MINERALS.

In a conveyance of land in *Northumberland* a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, &c.:—

Held, varying the decree of *Kindersley*, V.-C., that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry. *Bell* v. *Wilson.* 303

MINES.

See MINERALS.

MINUTE-BOOK, ENTRY IN.

See CONTRIBUTORY, 1.

MISDESCRIPTION.

See SPECIFIC PERFORMANCE.

MISREPRESENTATION.

See CONDITION AS TO TITLE.

MISTAKE.

See CONSIDERATION, WANT OF.
LANDS CLAUSES ACT, 1.
SPECIFIC PERFORMANCE.

MORTGAGE.

See RECEIVER, 1.
PRODUCTION OF MORTGAGE.

MORTGAGEE.

See LANDS CLAUSES ACT, 2.
SUSPENDING BANKRUPTCY, EFFECT OF.

MORTGAGEE, NOTICE TO.

See EAST RIDING REGISTRY ACT.

NAME.

See TRADE MARK, DEGREE OF SIMILARITY.

NEGOTIATION OF BILLS BY OFFICIAL LIQUIDATOR.

See SET-OFF IN WINDING-UP, 1.

NOTICE.

See BEER-SHOP, COVENANT NOT TO USE AS.
EAST RIDING REGISTRY ACT.
FORFEITURE OF SHARES, 2.
SUBSTITUTION OF TENANT.

NOTICE, PURCHASE WITH.

See NUISANCE, COMING TO.

NOTICE TO SHAREHOLDERS.

See FORFEITURE OF SHARES, 1.

NUISANCE.

See INCREASING NUISANCE.

NUISANCE, COMING TO.

H. sold land to persons who were described in the conveyance as copper-smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. *H.* subsequently sold neighbouring land to the Plaintiff, who bought with full notice of the existence of the copper-works. The Plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. V.-C. *Wood* held that the Plaintiff's having come to the nuisance did not disentitle him to equitable relief, and that *H.'s* having sold the site of the works with full knowledge that such works would be erected on it did not disentitle him or those claiming under him to complain of any nuisance which the works might occasion, and His Honour granted an interlocutory injunction:—

Held, on appeal, that the injunction had been rightly granted. *Tipping* v. *St. Helen's Smelting Company.* 66

OFFICIAL ASSIGNEES, ALLOWANCES TO.

The salary paid to the official assignees under the *Bankruptcy Act*, 1861, includes all remuneration to them for duties performed under the *Winding-up Acts* and similar Acts.

The official assignees are not entitled to retain the remuneration under the Bankruptcy Act, 1849, in respect of duties performed after the 11th of October, 1861, in bankruptcies which occurred before that date.

The Court is not precluded from opening accounts which have been passed by the Commissioner.

Sums of money which cannot be appropriated to any particular bankruptcy may be paid to the unclaimed dividend account.

The official assignees cannot retain small sums of money (although it may be very probable that those sums would be found due to them) without the regular investigation of the accounts. *In re Graham.* 175

OFFICIAL LIQUIDATOR.

See DISCRETION, 1, 2.

ORDER IN BANKRUPTCY OF 22ND MAY, 1862.

See ANNULLING REGISTRATION.

ORDER XXXVIII. OF 11TH NOVEMBER, 1862.

See FI. FA. BY OFFICIAL LIQUIDATOR.

PAID-UP SHAREHOLDER.

1. A fully paid-up shareholder in a limited company can present a Petition under the *Companies Act*, 1862, for winding-up the company. Order of the Master of the Rolls affirmed.

Where a Petition, presented by a company to discharge a winding-up order, was dismissed, the form of the order was to direct the costs of the Respondents to come out of the estate, and make no order as to the costs of the company. *In re National Savings Bank Association.* 547

2. A holder of fully paid-up shares in a limited liability company is a "contributory" within the meaning of the *Companies Act*, 1862. Therefore where, under the voluntary winding-up of such a company, all debts had been provided for, it was held (affirming the decision of *Wood*, V.-C.) that the liquidators were justified in making a call upon the partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up shareholders. *In re Anglesea Colliery Company.* 555

PAROL DECLARATION OF TRUST.

A father put a cheque into the hand of his son of nine months old, saying,

"I give this to baby for himself," and then took back the cheque and put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, and the cheque was found amongst his effects:—

Held, under the circumstances, that there had been no gift to or valid declaration of trust for the son.

A parol declaration of trust in favour of a volunteer may be valid, and may be enforced in equity.

The dictum in *Scales* v. *Maude* (6 D. M. & G. 51; 1 Jur. N. S. 1147), that a declaration of trust in favour of a volunteer is invalid, is not good law. *Jones* v. *Lock*. 25

PART PERFORMANCE.

1. A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—

Held, that this constituted a sufficient part performance of the agreement to take the case out of the *Statute of Frauds*, and specific performance was decreed. *Nunn* v. *Fabian*. 35

2. Previously to a marriage the intended husband and wife agreed in writing that the husband should have the wife's property for his life, paying her 80*l*. a year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement; the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found:—

Held (reversing the decision of *Stuart*, V.-C.), that, under the circumstances, there was not within the *Statute of Frauds* any contract to make a will, and that there had been no part performance which would take the case out of the statute.

The marriage in such a case is no part performance.

Part performance by the party to be charged will not take a case out of the statute. *Caton* v. *Caton*. 137

PARTIES.

One of the *cestuis que trust* under a deed of family arrangement made a settlement of his share. There were two trustees of the settlement, one of whom was also a trustee of the deed of arrangement. In a suit to administer the trusts of the deed of arrangement, and make the trustees of it responsible for breaches of trust:—

Held, that since one of the trustees of the settlement was an accounting party as a trustee of the deed of arrangement, the *cestuis que trust* under the settlement ought to be made parties. *Payne* v. *Parker*. 327

See VOLUNTARY SETTLEMENT.

PARTIES, DEFECT OF.

See RECEIVER, 2.

PARTNERSHIP.

The Plaintiff and Defendant had been partners under articles providing that the business should be carried on "for the mutual and common benefit of the partners, and risk of profit and loss in equal shares." The Defendant's capital was to be 1500*l*.; the Plaintiff's, 750*l*. The capital of each partner to carry interest at 5*l*. per cent., to be allowed yearly, before making up the accounts. Sums brought in by either partner above those amounts to bear interest at the same rate, payable before any other interest, and to be withdrawable at three months' notice. The partners were to be at liberty to draw certain specified sums on account

of their shares of profits. The remainder of each partner's share of profits to be added to his capital, and bear interest at 5*l.* per cent., to be paid before division of net profits. On dissolution, after payment of debts, "the remaining capital, stock, moneys, and credits belonging to the said partnership shall be divided, or received, or taken by the said partners according to their respective shares or interests therein." On dissolution, the capital standing to the Plaintiff's credit was not much increased; that of the Defendant greatly so, partly by accumulation of profits, and partly by cash brought in by him. After payment of debts, the assets were insufficient to replace the two capitals in full:—

Held, varying the decree of the Master of the Rolls, that the assets, after payment of debts, ought to be applied first in repaying to the Defendant, with interest, the additional capital brought in by him in cash, and that the residue ought to be divided between the partners in proportion to their capitals. *Wood* v. *Scoles.* 369

See Joint Estate.

PATENT.

See Joint Grantees of Patent.
Patent, Application for.

PATENT, APPLICATION FOR.

The time within which the application for the warrant and for the letters patent ought to be made under the rules of the Patent Commissioners extended where the delay was small and accidental. *In re Hersee & Smyth.* 518

PATENT LAW AMENDMENT ACT, 1852.

See Joint Grantees of Patent.

PETITIONER.

See Paid-up Shareholder, 1.

PETITIONING CREDITOR'S DEBT.

The obligation to pay a sum of money under an order of a Court of equity is merely an equitable debt, notwithstanding the 18th section of 1 & 2 Vict. c. 110, and cannot be made the ground of a Petition for adjudication in bankruptcy. *Ex parte Blencowe. In re Blencowe.* 393

PLAINTIFF, DEATH OF.

See Revivor.

PLEADING.

See Res Judicata.

PLYMOUTH BRETHREN.

See Guardian, Appointment of, 2.

POSSESSION, CONSTRUCTIVE.

See Specific Performance.

POSSESSION OF LUNATIC'S ESTATE.

See Deceased Lunatic.

PRACTICE.

See Appeal on adjourned Inquiry.
Bankruptcy Appeal.
Costs under Trustee Relief Act.
Enrolment, Vacating, 1, 2.
Executor, Conduct of Proceedings by.
Fi. Fa. by Official Liquidator.
Forma Pauperis, Appeal in.
Heir-at-Law, Inquiry as to.
Land Transfer Act.
Parties.
Receiver, 2.
Reprint of Bill.
Re-transfer of Cause.
Revivor.
Security for Costs.
Specific Performance of Award.
Voluntary Settlement.
Winding up, Notice of Appeal in.

PRACTICE IN BANKRUPTCY.

See JOINT ESTATE.

PRESCRIPTION.

A mine had from before the time of living memory been worked by tinbounders, according to the custom of *Cornwall*, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had from before the time of living memory used for the purpose of their works the water of an artificial watercourse arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed by *Kindersley*, V.-C., on the ground that there was no privity of estate between the owner and the bounders, and that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it :—

Held, on appeal, that an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine as well as with the bounders. *Ivimey* v. *Stocker*. 396

PRESCRIPTION FOR FOULING STREAM.

See INCREASING NUISANCE.

PRESUMPTION.

See PRESCRIPTION.

PRIORITY.

See EAST RIDING REGISTRY ACT.

PRODUCTION IN BANKRUPTCY.

On the hearing of a Petition for adjudication of bankruptcy, a clerk of the persons against whom the adjudication was prayed, who stated that he had no possession of their books :—

Held, not bound to produce them.

Where an order of a Commissioner is discharged on appeal, the costs of the appeal may be given to the Appellant. *In re Leighton and Benett.* 331

PRODUCTION OF MORTGAGE.

The 197th section of the *Bankruptcy Act*, 1861, giving the Court power under a registered deed to make the same orders as if the debtor were bankrupt, is not confined to deeds assigning property of the debtor.

A creditor of a debtor who had executed a registered deed, not passing any property, but containing a covenant to pay the debts by instalments, summoned another creditor to be examined, and called upon him to produce a mortgage deed which he held on part of the debtor's property :—

Held, that production ought to be ordered. *In re Marks' Trust Deed.* 429

PROFESSORSHIP, ENDOWMENT OF.

See JURISDICTION.

PROFITS.

See PARTNERSHIP.

PROFITS OF JOINT PATENT.

See JOINT GRANTEES OF PATENT.

PROPERTY, ORDER OF DIVORCE COURT AS TO.

See DIVORCE COURT, ORDER OF.

PROSPECTIVE NUISANCE.

See INCREASING NUISANCE.

PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

The course of proceeding under the 35th section of the *Companies Act*, 1862, considered.

Before a company had been registered, a person applied for shares on the faith of a prospectus stating the objects of the company, and immediately after its registration shares were allotted to him. The objects of the company, as defined by the memorandum of association, extended much further than the prospectus:—

Held, that he was entitled to have his name removed from the register.

The company was registered on the 28th of April, 1865. In the autumn the committee of the *Stock Exchange* refused to appoint a settling-day, on the ground of a variance between the prospectus and memorandum in a point of minor importance. *S.*, who had taken shares on the faith of the prospectus, attended a meeting in September, held for the purpose of correcting this variance:—

Held, that his attending this meeting was not a sufficient ground for fixing him with notice of the more important variances between the prospectus and memorandum, so as to affect his rights by acquiescence, he positively swearing that he did not know of those variances, and had never seen the memorandum, or had any acquaintance with its contents, till May, 1866, when he at once repudiated his shares. *In re Russian (Vyksounsky) Iron Works Company. Stewart's Case.* 574

PROTECTION ORDER.

See CREDITORS IN BANKRUPTCY.

PUFFERS.

Property was put up for sale by auction, the conditions stating that the highest bidder was to be the purchaser, and not saying anything as to bidding on behalf of the vendors. An agent of the vendors bid 2500*l.*, the auctioneer then bid 2600*l.*, and the agent and the auctioneer continued bidding against each other, till the biddings reached 3600*l.* The Defendant then bid 3650*l.*, and the property was knocked down to him:—

Held, reversing the decision appealed from, that the vendors could not enforce the contract.

Quære whether the rule allowing one puffer is good. *Mortimer* v. *Bell.* 10

PURCHASE FROM PERSONS UNDER DISABILITY.

See LANDS CLAUSES ACT, 1.

QUALIFICATION OF DIRECTOR.

See CONTRIBUTORY, 1.

QUARRIES.

See MINERALS.

RAILWAY.

See SPECIFIC PERFORMANCE OF AWARD.

RAILWAY COMPANY.

A railway company took land and made a railway thereon, and afterwards leased the railway to another company. Part of the purchase-money remained unpaid, and the landowner filed his bill against both companies, praying for payment of the money or an injunction to restrain them from using the land.

An order was made on motion, affirming the decision of *Stuart*, V.-C., that the first company should pay the money, and in default that both companies should be restrained from using the land. *Cosens* v. *Bognor Railway Company.* 594

See COMPENSATION MONEY, APPLICATION OF IN BUILDING.
HOUSE, PART OF.
LANDS CLAUSES ACT, 1, 2, 3.

REAL AND PERSONAL ESTATE.

See FOREIGN SUIT.

RECEIVER.

1. A mortgagor and his two incumbrancers, by a deed, conveyed the mortgaged estates to trustees on trust to keep down the interest on the charges, and to accumulate the surplus rents and apply them in payment of principal, with an ultimate trust for the mortgagor; and by the deed it was declared that nothing therein should derogate from the rights of the incumbrancers, and that when they were paid off, the trusts of the deed should cease:—

Held, that a subsequent judgment creditor of the mortgagor could maintain a bill against all parties to the deed, and have the accounts taken under the deed without offering to redeem.

The receiver in an ordinary receiver-deed is the agent of the mortgagor only, but not so in a deed such as this, which created other trusts. *Jefferys* v. *Dickson*. 183

2. After an order had been made on summons for the administration of the real and personal estate of a testatrix, the sole executor and trustee became bankrupt:—

Held (reversing the decision of the Master of the Rolls), that a receiver ought to be appointed, and that the fact of the assignees not being before the Court was not a sufficient reason for refusing to appoint one. *In re Johnson. Steele* v. *Cobham*. 325

REDEMPTION.

See RECEIVER, 1.

REGISTER, RECTIFICATION OF.

See PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

RE-REGISTERING.

See VOLUNTARY WINDING UP, 1.

REGISTRATION OF DEED.

The Lord Chancellor has no power to direct a trust deed to be registered under the *Bankruptcy Act*, 1861, when more than twenty-eight days have elapsed since its execution, although the deed may have been left with the Registrar, and an application for registration may have been made to the Commissioner within the twenty-eight days. *In re Power*. 153

REGISTRATION, RESCINDING.

See EXECUTION, LEAVE TO ISSUE, 2.

RELEASE BY GIVING UP SECURITY.

The residuary estate of a testatrix consisted in part of a debt secured by a policy of assurance on the life of the debtor. The residuary legatees gave up the policy to the debtor, and signified their intention of releasing the debt on condition of his paying the probate and legacy duty on the debt:—

Held (*dubitante Knight Bruce*, L.J.), that the payment of the probate and legacy duty formed a good consideration for the release of the debt, and that the debt was released.

Per TURNER, L.J.—*Semble*, that although the giving up of a security is not in itself a release of the debt, yet when it is given up with a clearly expressed intention of releasing the debt, it may amount to a release even at law.

Per TURNER, L.J.—*Semble*, also, that notwithstanding the rule, that where there is no release of a debt at law, there is none in equity, yet there may be considerations which would prevent the debt from being enforced in equity, although subsisting at law. *Taylor* v. *Manners*. 48

RELIGIOUS EDUCATION.

See GUARDIAN, APPOINTMENT OF, 2.

RENT, CLAIM FOR IN WINDING UP.

See WINDING-UP, CLAIMS BY LESSOR IN.

RENEWABLE LEASES.

See CHARITY.

REPAIRS.

See SPECIFIC PERFORMANCE OF AWARD.

REPRINT OF BILL.

Although the amendments in a bill do not exceed in any one place two folios, the Clerk of Records and Writs has a discretion to refuse to file it without reprint, if the amendments are numerous and complicated. *John* v. *Lloyd.* 64

RES JUDICATA.

Demurrer will lie to a bill, though called a cross bill, if it is not really a cross bill.

Demurrer will not lie to a bill on the ground of *res judicata*, unless it avers that everything in controversy as the foundation of relief was also in controversy in the former suit.

Order of *Stuart*, V.-C., overruling demurrer affirmed. *Moss* v. *Anglo-Egyptian Navigation Company.* 108

RESERVATION IN DEED.

See MINERALS.

RE-TRANSFER OF CAUSE.

Where a cause has by General Order been transferred from one Court to another, a re-transfer will not, without consent, be ordered where it will delay the hearing. Where it will not be delayed, the Court will give weight to the fact that the Judge from whose Court it has been transferred has, by means of interlocutory applications, gained an acquaintance with the facts. *Platt* v. *Walter.* 471

REVIVOR.

Where a sole Plaintiff dies, the suit may be revived after decree without bill filed. *Colyer* v. *Colyer.* 482

ROLT'S ACT.

See DAMAGES.

SALE BY AUCTION.

See PUFFERS.

SALE UNDER BANKRUPTCY.

See SUSPENDING BANKRUPTCY, EFFECT OF.

SALE OF LAND.

See LUNACY REGULATION ACT, s. 125.

SCHEME, JURISDICTION TO ALTER.

See CHARITY.

SCIENTIFIC EVIDENCE.

See INCREASING NUISANCE.

SECURED CREDITORS.

See MAJORITY OF CREDITORS.

SECURITY FOR COSTS.

Upon an application under s. 69 of the *Companies Act*, 1862 :—

Held, varying the order of *Wood*, V.-C., that the security for costs given by a limited company is not confined to 100*l.*, but must be for an amount equal to the probable amount of costs payable. *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan.* 437

SECURITY, GIVING UP.

See RELEASE ON GIVING UP SECURITY.

SET-OFF IN WINDING UP.

1. The principles on which the Court acts under section 95 of the *Companies Act*, 1862, considered.

At the time when an order was made for winding up a company, the company was the holder of bills accepted by *S. & Co.* which would become payable in six months. At the

same time *S. & Co.* were holders of bills drawn by the company, which the drawees, shortly before the winding-up order, had refused to accept:—

Held, reversing the decision of the Master of the Rolls, that *S. & Co.* had no right to set-off against each other the present liability of the company under their dishonoured bills and the future liability of *S. & Co.* under their acceptances, nor any right to have the bills retained by the official liquidator until a right of set-off arose, but that the official liquidator ought to be allowed to negotiate the bills accepted by *S. & Co.*

Whether there was jurisdiction under the Act (without bill) to entertain an application by *S. & Co.* to restrain the official liquidator from negotiating their bills.—*Quære. In re Commercial Bank Corporation of India and the East. Smith, Fleming, & Co.'s Case. Gledstanes & Co.'s Case.* 538

2. A shareholder in a limited company, who is also a creditor of the company under a contract, is not, in the event of the company being wound up, entitled to set-off the debt due to him against the calls, nor to set-off against the calls a dividend which may hereafter come to him. But upon payment of all calls which have become due, he is entitled to receive dividends at the same time and at the same rate with the other creditors. *In re Overend, Gurney, & Co. Grissell's Case.* 528

SETTLED ESTATES.

See LEASES UNDER 1 WILL. 4, c. 65.

SETTLEMENT.

See PART PERFORMANCE, 2.

SEWAGE.

See INCREASING NUISANCE.

SHARES, ACCEPTANCE OF.

See CONTRIBUTORY, 3, 4.

SHARES, SALE OF, PENDING WINDING UP.

See WINDING UP, SALE PENDING.

SHARES TAKEN BY EXECUTORS.

See CONTRIBUTORY, 2.

SHIPOWNER, LIABILITY OF.

See LIMITATION OF SHIPOWNER'S LIABILITY.

SHIPPING.

See LIMITATION OF SHIPOWNER'S LIABILITY.

SOLE PLAINTIFF, DEATH OF.

See REVIVOR.

SOLICITOR.

See DECEASED LUNATIC.

SPECIFIC PERFORMANCE.

The owners of land agreed to demise to *A.* the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be eighty-three acres or thereabouts. The owners made a similar agreement with *B.* as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only:—

Held, on a bill filed by *B.* to restrain *A.* from working coal to the east of the fault, that the Court would not in a suit by *B.* for specific performance against the owners have decreed a demise of all the minerals to the east of the fault, and that he could not be deemed in constructive possession, so as to maintain his suit against *A.*

Quære, whether *B.* was tenant from year to year, or what his title was, and whether, under the circumstances, if the fault had run nearly in the direction of the line, a different con-

struction would not have been given. *Davis* v. *Shepherd.* 410

SPECIFIC PERFORMANCE.

See CONDITION AS TO TITLE.
DOUBTFUL TITLE.
INTEREST PAYABLE BY PURCHASER.
LANDS CLAUSES ACT, 1.
PUFFERS.
SUBSTITUTION OF TENANT.

SPECIFIC PERFORMANCE OF AWARD.

By an award made in June, 1863, under a reference at *nisi prius*, the arbitrator awarded that the Defendant should execute to the Plaintiff a lease of the right to use such part of a certain railway made by the Plaintiff as was upon the land of the Defendant, the lease to be in the words set out in the award; and that the Defendant should have a right of running carriages over the whole line on certain terms, and might require the Plaintiff to supply engine-power, while the Plaintiff should have an engine on the railway; and that the Plaintiff should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to the Defendant. The Plaintiff applied at law to set aside the award, and ultimately in April, 1864, the application was refused. In July, 1864, the Plaintiff filed his bill for specific performance of the award:—

Held, reversing the decree of *Wood*, V.-C., that specific performance could not be decreed, inasmuch as the provisions in favour of the Defendant could not be enforced at once, but gave the Defendant a right to have certain duties continuously performed by the Plaintiff for a number of years, and the Court could not undertake to see to such performance.

Semble, that even if the award had been one of which specific performance could have been decreed, the Plaintiff could not, after taking proceedings to set it aside, have enforced specific performance.

The Defendant appealed from an order overruling a demurrer, and from the whole of the decree made at the hearing:—

Held, that the Plaintiff was entitled to begin. *Blackett* v. *Bates.* 117

STATEMENT OF DEBTS.

A debtor was adjudged bankrupt on his own Petition, and on the 22nd of January filed his statement under the *Bankruptcy Act*, 1861, s. 93. On the 6th of February assignees were chosen, who proceeded to get in the estate. On the 21st of February, a creditor who had proved her debt at the meeting of the 6th, gave notice of motion for the 5th of March, to annul the adjudication and dismiss the Petition, on the ground that the statement was inaccurate, inasmuch as the bankrupt had omitted from it the names of some fully secured creditors. On the 5th of March the Commissioner adjourned the application, giving the bankrupt leave in the meantime to file an amended statement, which he filed on the 17th of March. On the 11th of April the application was finally heard, when the Commissioner made an order annulling the adjudication, and dismissing the bankrupt's Petition, from which order the assignees appealed:—

Held, by *Knight Bruce*, L.J., that whatever right the Respondent might have had to set aside the adjudication if she had proceeded with more diligence, she had, by her course of conduct, debarred herself from any such right:—

Held, by *Turner*, L.J., that the Act and General Orders indicated so obscurely the necessity of entering fully secured debts in the statement, that no fraud could be imputed to the bankrupt on account of his omitting them; and that there was no sufficient reason for annulling the adjudication, the Court having power to decide that the special circumstances of any particular case took it out of the General Orders. *Ex parte Sampson. In re Cobham.* 476

STATUTES.

27 Eliz. c. 4.

See Voluntary Settlement.

29 Car. 2, c. 3.

See Part Performance, 1, 2.

6 Anne, c. 35.

See East Riding Registry Act.

1 Will. 4, c. 65.

See Leases under 1 Will. 4, c. 65.

5 & 6 Vict. c. 45 (Law of Copyright Amendment Act).

See Copyright of Alien.

9 & 10 Vict. c. 93 (Lord Campbell's Act).

See Limitation of Shipowner's Liability.

12 & 13 Vict. c. 106 (Bankrupt Law Consolidation Act, 1849).

See Allowance to Bankrupt.
Official Assignees, Allowances to.

Sections 100, 260.

See Production in Bankruptcy.

Section 101.

See Bankrupt Law Consolidation Act, 1849, s. 101.

Section 112.

See Creditor in Bankruptcy.

15 & 16 Vict. c. 83 (Patent Law Amendment Act).

See Joint Grantees of Patent.

15 & 16 Vict. c. 86, s. 42, Rule 9 (Chancery Amendment Act).

See Parties.

16 & 17 Vict. c. 51 (Succession Duty Act).

See Succession Duty.

16 & 17 Vict. c. 70 (Lunacy Regulation Act).

See Lunacy Regulation Act, s. 125.

17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854).

See Limitation of Shipowner's Liability.

17 & 18 Vict. c. 120 (Merchant Shipping Acts Repeal Act).

See Limitation of Shipowner's Liability.

21 & 22 Vict. c. 27 (Cairns' Act).

See Damages.

22 & 23 Vict. c. 61, s. 5 (Divorce Act).

See Divorce Court, Order of.

24 & 25 Vict. c. 134 (Bankruptcy Act, 1861).

See Allowance to Bankrupt.
Appointed Property, Effect of Composition on.
Bankrupt Law Consolidation Act, 1849, s. 101.
Execution, Leave to Issue, 1.
Official Assignees, Allowances to.

Section 18.

See Petitioning Creditor's Debt.

Section 93.

See Statement of Debts.

Section 136.

See Suspending Bankruptcy, Effect of.

24 & 25 Vict. c. 134—(*continued.*)

Section 153.

See Damages, Assessment of, under Composition.

Section 159.

See Debts without Expectation of Payment, 1, 2.

Section 192.

See Execution of Composition Deed.
Execution, Leave to Issue, 2.
Majority of Creditors.
Registration of Deed.

Section 197.

See Production of Mortgage.

25 & 26 Vict. c. 42 (Rolt's Act).

See Damages.

25 & 26 Vict. c. 63 (Merchant Shipping Act Amendment Act).

See Limitation of Shipowner's Liability.

25 & 26 Vict. c. 89 (Companies Act, 1862).

See Prospectus and Memorandum, Variance between.

Sections 38, 74, 133, Art. 9.

See Paid-up Shareholder, 2.

Section 82.

See Paid-up Shareholder, 1.

STATUTE OF FRAUDS.

See Part Performance, 1, 2.

STREAM.

See Increasing Nuisance.

SUBSTITUTION OF TENANT.

In August, 1856, the Plaintiff agreed to let a house to the Defendant for seven, fourteen, or twenty-one years, the Defendant to keep the premises in repair, and paint and paper as therein mentioned, and the Defendant was let into possession. In 1859 the Plaintiff agreed with the Defendant to accept a Mr. *Williams* as tenant in his room upon the same terms, the Defendant guaranteeing the rent. *Williams* had just before this been let into possession by the Defendant, and he paid rent till 1863. In that year the Defendant gave a notice to determine his tenancy at the end of the first seven years. *Williams* and the Defendant having both denied their liability to paint and paper according to the terms of the original agreement, the Plaintiff, in November, 1864, filed his bill to compel the Defendant to accept a lease;—

Held, reversing the decree of the Master of the Rolls, that the Defendant could not be compelled to accept a lease.

Per Turner, L.J.:—The agreement of 1859 was substitutionary for the agreement of 1856, and although the Plaintiff, if he had within a reasonable time called upon the Defendant to procure *Williams* to take the lease, would probably, upon the Defendant failing to do so, have been entitled to call for performance of the original agreement, he was not so entitled after the time which had elapsed, and *semble* the Defendant's notice in 1863 would have been sufficient to prevent specific performance. *Moore* v. *Marrable*. 217

SUCCESSION DUTY.

Succession Duty is not payable on legacies given by the will of a person domiciled in a foreign country. *Wallace* v. *The Attorney-General*. *Jeves* v. *Shadwell*. 1

SUCCESSION DUTY ACT, s. 2.

See Succession Duty.

SUPPLEMENT.

See REVIVOR.

SUSPENDING BANKRUPTCY, EFFECT OF.

Where the proceedings in a bankruptcy have been suspended by resolutions under section 136 of the *Bankruptcy Act*, 1861, and there is nothing in the resolutions to preserve the jurisdiction of the Court of Bankruptcy, its jurisdiction to order a sale on the Petition of an equitable mortgagee is gone. *In re Carter.* 170

TEMPORARY RESIDENCE.

See COPYRIGHT OF ALIEN.

TENANCY.

See BEER-SHOP, COVENANT NOT TO USE AS.
PART PERFORMANCE, 1.
SPECIFIC PERFORMANCE.
SUBSTITUTION OF TENANT.
WINDING-UP, CLAIM BY LESSOR IN.

TENANT FOR LIFE.

See COSTS UNDER TRUSTEE RELIEF ACT.

TENANT FOR LIFE AND REMAINDERMAN.

See TITLE DEEDS.

TIME.

See FORFEITURE OF SHARES, 2.

TIME, EXTENSION OF.

See PATENT, APPLICATION FOR.

TIME FOR REGISTRATION.

See REGISTRATION OF DEED.

TIN BOUNDERS.

See PRESCRIPTION.

TITLE.

See CONDITION AS TO TITLE.

TITLE DEEDS.

A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of the leases to *Paris*. He afterwards, under an order of the Court, brought the whole of the title deeds and leases into Court, for the purposes of the suit. The purposes of the suit having been satisfied, and the portions raised by mortgage, he applied to have the title deeds and leases given up to him, which application was opposed by the mortgagees, and was refused by *Kindersley*, V.-C. :—

Held, by *Knight Bruce*, L.J., that as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mortgagees :

Per TURNER, L.J., *semble*, that the deeds ought to be delivered to him, on his giving sufficient security for their safe custody and production, and for returning them to Court when ordered.

Evidence referred to, not in the order under appeal, but in a previous order in the cause, cannot be read. *Jenner* v. *Morris.* 603

TITLE, DOUBTFUL.

See DOUBTFUL TITLE.

TOWNS, LIGHT IN.

See LIGHT IN TOWNS, 1, 2.

TRADE MARK, DEGREE OF SIMILARITY.

No trader can adopt a trade mark so resembling that of another trader, that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade marks side by side.

Nor can a trader, even with some claim to the mark or name, adopt a trade mark which will cause his goods to bear the same name in the market

as those of a rival trader. *Seixo* v. *Provezende.* 192

TRANSFER.

See Re-transfer of Cause.
Winding-up, Sale pending.

TRUST.

See Undue Influence.

TRUST, PAROL DECLARATION OF.

See Parol Declaration of Trust.

TRUSTEE.

See Parties.
Receiver, 1.

TRUSTEE ACTS.

See Trustee, Principle of Selection.

TRUSTEE BEING BANKRUPT.

See Receiver, 2.

TRUSTEE, PRINCIPLE OF SELECTION.

The discretion which the Court exercises in appointing new trustees is not a mere arbitrary discretion, but is to be exercised in accordance with certain principles. Among them are the following:—

First—In selecting a person for the office, the Court will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from, the instrument creating it.

Secondly—The Court will not appoint a person with a view to the interest of some of the *cestuis que trusts*, in opposition to the interest of others.

Thirdly—The Court will have regard to the question whether the appointment will promote or impede the execution of the trust. But

Semble, the mere fact of the continuing trustee refusing to act with the proposed new trustee, would not be sufficient to induce the Court to refrain from appointing him.

Where the question of the appointment of a new trustee has been brought before the Court of appeal for rehearing, the Court, in considering the fitness of the new trustee, is not precluded from regarding evidence of occurrences subsequent to the original hearing. *In re Tempest.* 485

TRUSTEE RELIEF ACT.

See Costs under Trustee Relief Act.

TRUSTEES, ESTATE OF.

See Doubtful Title.

ULTIMATE REMAINDER.

See Equity to a Settlement.

ULTRA VIRES.

See Award, Jurisdiction to rectify.

UNDUE INFLUENCE.

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases; they are important only where no such confidential relation exists.

Where a confidential relation is established the Court will presume its continuance, unless there is distinct evidence of its determination.

The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*. *Rhodes* v. *Bate.* 252

VACATING ENROLMENT.

See ENROLMENT, VACATING, 1, 2.

VARIANCE.

See PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

VENDOR AND PURCHASER.

See CONDITION AS TO TITLE.
DOUBTFUL TITLE.
INTEREST PAYABLE BY PURCHASER.
LANDS CLAUSES ACT, 1.
PUFFERS.
RAILWAY COMPANY.
SUBSTITUTION OF TENANT.

VENDOR'S LIEN AGAINST RAILWAY COMPANY.

See RAILWAY COMPANY.

VISITOR OF COLLEGE.

See JURISDICTION.

VOLUNTARY SETTLEMENT.

A lady, who was entitled in fee to an estate subject to mortgages, proposed to her nephew that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this, provided she would settle the estate, limiting it to him after her death. She agreed to this, and a settlement was accordingly executed by which the nephew covenanted to indemnify her from all liability in respect of the mortgages, except the payment of the interest during her life. He removed to a larger house at considerable expense, and they lived together for some time. The aunt afterwards ceased to live with the nephew, and agreed to sell the estate to a purchaser, who filed a bill against the aunt and nephew for specific performance :—

Held, reversing the decree of the Master of the Rolls, that the settlement was not voluntary; the covenant of indemnity and the expenses incurred by the nephew on the faith of the settlement being severally sufficient to support it as made for value.

Semble, that had the settlement been voluntary, and so void against a purchaser, the nephew would have been a proper party to the suit, but could not have established any claim to the purchase-money. *Townend* v. *Toker*. 446

VOLUNTARY WINDING-UP.

1. A company registered under the former *Joint Stock Companies Acts*, may be wound up voluntarily under the supervision of the Court without being re-registered under the Act of 1862. *In re London Indiarubber Company*. 329

2. At a general meeting of the shareholders of a banking company resolutions were passed for the voluntary winding-up of the company, and appointment of liquidators, and for confirming an agreement for the amalgamation of the company with the *Bank of H.*, upon certain terms therein specified. The liquidators proceeded to wind up the company upon the footing of the amalgamation, and in conformity with the 161st section of the *Companies Act*, 1862. Two dissentient shareholders, who were abroad at the time of the meeting, presented a Petition impeaching the amalgamation on the ground of the insufficiency of the notice convening the meeting, and for other reasons; and praying, 1, that the company might be wound up by an order of the Court; 2, that if not, the voluntary winding-up might be continued under the supervision of the Court; 3, that the rights of the Petitioners as against their co-contributories and the liquidators might be declared; or, 4, that they might be at liberty to use the names of the company and the liquidators in any proceedings they might be advised to take in reference to the winding-up :—

Order of the Master of the Rolls dismissing the Petition discharged, and

Held, first, that in the absence of any distinct allegations in the Petition of misconduct on the part of the liquidators, the Court would make no order for continuing the voluntary winding-up under the supervision of the Court: Secondly, that inasmuch as the voluntary winding up and the amalgamation were all one transaction, and the amalgamation could not be impeached in that jurisdiction, and in the absence of the *Bank of H.*, the Petition must stand over to permit the Petitioners to take proceedings to set aside the amalgamation; and thirdly, that the Petitioners might be at liberty to use the names of the company and the liquidators in such proceedings, on giving an undertaking to abide by such order as to costs as this Court might make. *In re Imperial Bank of China, India, and Japan.* 339

VOLUNTARY WINDING-UP.

See PAID-UP SHAREHOLDER, 2.

VOLUNTEER.

See PAROL DECLARATION OF TRUST.

WATERCOURSE.

See PRESCRIPTION.

WIFE, AMOUNT SETTLED ON.

See EQUITY TO A SETTLEMENT.

WIFE EXECUTRIX.

A married woman executrix proved the will and survived her husband:—

Held, overruling *Stuart*, V.-C., that she was liable for a *devastavit* committed by her husband during their joint lives.

Benyon v. *Gollins* (2 Bro. C. C. 323; 2 Dick. 697) commented on. *Soady* v. *Turnbull.* 494

WIFE'S LIFE INTEREST.

See DIVORCE COURT, ORDER OF.

WILL.

See GIFT BY IMPLICATION TO ISSUE.
SUCCESSION DUTY.

WILL, CONTRACT TO MAKE.

See PART PERFORMANCE, 2.

WINDING-UP.

A company being in course of voluntary winding-up, a Petition was presented, under the 165th section of the *Companies Act*, 1862, by some of the contributories, charging the directors with misapplication of moneys of the company, and praying a winding-up by the Court. The evidence being insufficient to establish the case of misapplication, but sufficient to lay ground for inquiry, the Court refused to direct an inquiry, but gave liberty to the Petitioners to file a bill in the name of the company against the directors, the Petitioners to indemnify the company against the costs.

Per TURNER, L.J.: *Semble*, that where a resolution for the voluntary winding-up of a company has been duly made, an order for winding-up by the Court cannot be made on the application of contributories.

Per TURNER, L.J.: Whether the 165th section of the *Companies Act*, 1862, applies under a voluntary winding-up *quære*. Where it does apply, the Court has a discretion as to whether the remedies given by it should be resorted to. *In re Bank of Gibraltar and Malta.* 69

See CONTRIBUTORY, 1, 2, 3, 4.
DISCRETION, 1, 2.
FI. FA. BY OFFICIAL LIQUIDATOR.
FORFEITURE OF SHARES, 2.
PAID-UP SHAREHOLDER, 1, 2.
SET-OFF IN WINDING-UP, 1, 2.
VOLUNTARY WINDING-UP, 1, 2.

WINDING-UP ACTS.

See OFFICIAL ASSIGNEES, ALLOWANCES TO.

WINDING-UP, CLAIM BY LESSOR IN.

A company, which had taken a lease of a quarry, and covenanted for payment of the rent was ordered to be wound up, and the leasehold interest was sold under the winding-up. On the application of the lessor for leave to enter a claim for future rent, which had been refused by the Master of the Rolls, it was ordered that a claim should be entered for the whole value of the future rent, with the qualification that the lessor should not receive more than the amount which the company might become liable to pay under the covenant; the order to be without prejudice to any application to dissolve the company, but no order of dissolution to be made without notice to the lessor. *In re Haytor Granite Company.* 77

WINDING-UP, NOTICE OF APPEAL IN.

The restriction of appeals in section 124 of the *Companies Act*,1862, to those in which notice has been given within three weeks after the making of the order appealed from, does not apply to appeals from any order made on the original Petition for winding up. *In re Universal Bank.* 428

WINDING-UP, SALE PENDING.

Under the *Companies Act*, 1862, the Court has a discretion to make valid any dealings with shares between the presentation of a Petition for winding-up and the order made upon it, but

Held, reversing the order of the Master of the Rolls, that an agreement for the sale of shares in a company, entered into in ignorance that a Petition for winding up the company had been presented, was not enforceable or valid, so as to make the purchaser a contributory. *In re London, Hamburg, and Continental Exchange Bank. Emmerson's Case.* 433

WITNESS.

See PRODUCTION IN BANKRUPTCY.

WORDS.

See BEER-SHOP, COVENANT NOT TO USE AS.
CREDITOR IN BANKRUPTCY.
MINERALS.

YEARLY TENANT, NOTICE TO.

See BEER-SHOP, COVENANT NOT TO USE AS.

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